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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

BARBARA G. FRANKLIN,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel F. Lynch
Counsel of Record
925 East 17th Avenue
Denver, CO 80218
(303) 830-7274

Attorney for Petitioner

CENTER PRINTING, 333 13TH STREET, DENVER, CO 80202

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QUESTION PRESENTED FOR REVIEW

1. Whether the holding of the Court of Appeals that the VA's stated reason for refusing to accept Barbara Franklin's application for employment as a chaplain, *viz.* that she did not have a degree of Master of Divinity, and that her "course work in divinity, biblical studies, church history, biblical languages, [and] theology" was insufficient, and that her professional experience does not follow her professional training, was a legitimate, non- discriminatory, response to her complaints under Title VII, decided an important question in a way that conflicts In this case, the only one of these elements which is disputed is whether or not Rev. Franklin was qualified for the chaplain position. It is not disputed that Rev. Franklin meets all of the other elements of a prima facie case.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Barbara G. Franklin,

Plaintiff-Appellant,

v.

Jesse Brown, Secretary of the Department of Veterans Affairs,

Defendant-Appellee.

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OPINIONS BELOW

On February 17, 1999, the United States Court of Appeals for the Tenth Circuit issued an unpublished Order and Judgment in Barbara Franklin v. Department of Veterans Affairs, No. 97-1264 (10th Cir.) This opinion is the subject of this Petition for Writ of Certiorari. A copy of the Court of Appeals Opinion is attached in Appendix A. The District Court entered its order granting summary judgment to the Veterans Administration on May 20, 1997. A copy of the District Court's Order is attached as Appendix B as well as a copy of the Recommendation of United Magistrate Judge, Appendix C.

BASIS FOR JURISDICTION

The Supreme Court has jurisdiction to consider this Petition for Writ of Certiorari.

Date Order and Judgment Below was Entered

The United States Court of Appeals issued the opinion that is the subject of this Petition on February 17, 1999. (Appendix A)

Petition for Rehearing Not Filed

Petitioner did not file a Petition for Rehearing or a Suggestion for Rehearing *En Banc* because the Tenth Circuit panel attached a Notice to its opinion disapproving filings for rehearing which "simply reargue the briefs" and noting that "[i]t is not necessary to file a petition for rehearing to reserve the right to petition for certiorari."

Statutory Basis for Jurisdiction

The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The following constitutional provisions, statutes, and rules are involved in the issues presented in this Petition for Writ of Certiorari. The text of each is set forth in full in the Appendix.

U.S. Const. Article VI

U.S. Const. Amend, I

42 U.S.C. § 2000e-2a

Rule 56, Fed. R. Civ. P.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in Court of First Instance

The District Court had jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a. The District Court had jurisdiction under 28 U.S.C. § 1291.

Facts Material to Consideration of Questions Presented

On May 10, 1994, Rev. Franklin applied to the VA for a position in the Veterans Medical Center at Denver, Colorado. (Appendix C, p. 36)

Rev. Franklin is a member of two protected classes, to-wit: she is an African-American, Female. (Appendix C, p. 35)

Female chaplains and minorities are under represented in the VA chaplaincy. (Appendix C, pp. 43-44)

Rev. Franklin was ordained as a minister in the African Methodist Episcopal System a denomination recognized by the VA as a proper sponsor of chaplains. (Appendix C, p. 35)

Rev. Franklin possesses a Master of Arts degree in Human Services from Pacific Lutheran University, Tacoma, Washington (Appendix E, Ex. 188) and a Ph.D. in Theocentric Counseling from an unaccredited institution, LaSalle University, Mandeville, Louisiana. (Appendix E, p. 70)

Rev. Franklin has many years experience in counseling and adult education in the military services. She has worked as a Licensed Practical Nurse in military hospitals and counseled military personnel in matters including family problems,

alcohol and drug dependency, sexual harassment and sexual conduct. She also worked as a minister at the Federal Correctional Institution in Englewood, Colorado and with Chuck Colson's Prison Fellowship. (Appendix E, Ex. 1, pp. 86-88)

For almost a year, Rev. Franklin served as a volunteer at the Veterans Medical Center in Denver, providing many of the same services rendered by full time chaplains. (Appendix C, p. 36)

By letter, the VA refused to accept Rev. Franklin's application and returned it to her, finding that she failed to meet the minimal requirements in experience and education. Specifically, it found that she did not have: [1] the master of divinity or its equivalent, "[because your graduate school transcripts do not show significant coursework in divinity, biblical studies, church history, biblical languages, or theology"; and [2] that she lacked "three years pastoral care experience **after completion of professional preparation**" (Emphasis in original document.) (Appendix C, p.37)

After Rev. Franklin was notified that her application was not accepted, she protested, through counsel, in a letter, dated August 6, 1994, to John J. Batten, Personnel Management Specialist, Department of Veterans Affairs who had returned her application by letter of July 20, 1994. (Appendix C, p.37)

Rev. Franklin reapplied for a position of Staff Chaplain, GS-060-11, at the Veterans Medical Center in Denver, Colorado. (Appendix C, p. 37)

After receipt of counsel's August 6, 1994 letter, the VA appointed two chaplains who had nothing to do with her original application to review her resubmitted application dated August 8, 1994. These persons came to the same conclusion

the VA had previously reached. (Appendix C, p.37)

The person ultimately selected for the job opening of VA chaplain at the Veterans Medical Center in Denver, Colorado was a Caucasian male. (Appendix C, p.37)

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. **By holding that the VA's stated reason for refusing to accept Barbara Franklin's employment application was a legitimate, non-discriminatory, response to her complaint of discrimination under Title VII, the Court of Appeals decided an important question in a way that conflicts with relevant decisions of this Court.**

The reasons given by the VA for rejecting Rev. Franklin's application for the VA chaplaincy were that she does not have a Master of Divinity degree, that her "course work in divinity, biblical studies, church history, biblical languages,[and] theology" is insufficient, and that her professional experience does not follow her professional training. [Appendix C, p. 36]

VA contends that these shortcomings constituted the government's "legitimate, non-discriminatory reason" for its refusal to consider Rev. Franklin's application. [Appendix C, p 36]

This is an action brought under Title VII claiming discrimination in employment on account of race and sex. In such a case, plaintiff must state a prima facie case of discrimination on forbidden grounds. The four things she must establish are that: [1] she is a member of a protected class; [2] she applied for and possessed the qualifications for the job of chaplain; [3] she was rejected; and [4] there was a continuing need for chaplains, eventually filled by a person not a member of a protected class. McDonald Douglas Corporation v. Green, 411 U.S. 792, 36 L. Ed.2d 668, 93 S. Ct. 1817 (1981)

It was "undisputed that she satisfied all the elements of a

prima facie case, except for the qualification element." (Appendix, C., p. 38)

It is apparent from a simple reading of the Government's letter returning Rev. Franklin's application that the government insists on a particular theological curriculum and on "pastoral care experience" which can only follow and not precede completion of that theological curriculum.

Rev. Franklin contends that her sponsoring denomination alone has the capacity to judge her religious qualifications. The Government may insist that she also possess reasonable secular qualifications to assure competent performance of her position by secular standards. The government, however, has no competence to make an ecclesiastical judgment, whether as to ordination, or as to the education needed to produce a clergy person. Gonzales v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 50 S. Ct. 5, 74 L.Ed 131 (1929); Murphy v. Derwinski, 776 F.Supp. 1466 (D. Colo.), aff. 990 F.2d 540 (C.A.10th Cir. 1992).

In any number of cases, this Court has made it clear that civil courts may not involve themselves in interpreting or deciding religious questions. Gonzales v. Roman Catholic Archbishop of Manila, *supra*. In that case, the court said:

> "It is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before secular courts as conclusive. . . " 280 U.S. 7-8

While the Gonzales case involves a chaplaincy within

the church, and not the civil system, the basic fact is that the government has no more competence to determine the religious qualifications of a chaplain for the VA or the military than it does to determine those qualifications for other purposes. The basic holding of Gonzales, under the First Amendment, is that, ***the government is incompetent to make any religious decision***.

That has consistently been the position of this Court. Minsker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (CADC 1990) Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 80 S. Ct. 1037, 4 L. Ed. 2d 1140 (1960); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969); Maryland and Virginia Eldership of the Church of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 90 S. C.. 499, 24 L. Ed. 2d 582 (1970); Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 328 N.E. 2d 268 (1975); and Jones v. Wolf, 433 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

The cases cited above are all intra church disputes over property rights, but that is not the only context in which this Court has said that the government is incompetent to resolve any religious matters.

In Engle v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) this Court held the government incompetent to write a prayer and to mandate that it be recited in public schools.

> "It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 82 U.S. 221.

How much more obvious is it that the government cannot decree the professional standards and courses of study for ministers of religion?

The practice of employing chaplains for legislative prayers has been upheld by this Court. Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L.Ed. 2d 1019 (1983) Rev. Franklin does not dispute the government's right to employ chaplains for service to patients at VA hospitals.

She does contend that the government cannot require a specified theological education as a condition of federal employment. To do so amounts to the establishment of a religious test for an office under the United States in violation of Article VI of the Constitution of the United States and constitutes a violation of the Establishment Clause of the First Amendment to the Constitution of the United States.

The trial court concluded that, even if it assumed "that Defendant's qualification criteria were unconstitutional, Plaintiff's claims fail because she cannot meet her burden on summary judgment to show that the Defendant's stated reason was 'a pretext for discrimination against a protected class.'" Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L.Ed. 2d 1019 (1983)

Rev. Franklin disputes the trial court judgment for this reason:

The government has a right to assure itself only that an applicant for a chaplaincy possesses sufficient educational and experiential qualifications to fulfill the government's requirements for the performance of the secular aspects of the position.

It is not permitted to demand specific religious qualifications of applicants. In Murphy v. Derwinski, *supra.*

the VA refused to accept and process an application of an otherwise qualified candidate for a VA chaplaincy on the ground that she was not ordained. There were and are five published qualifications for VA chaplaincy: [1] U.S. citizenship; [2] ordination; [3] A B.A. degree, plus a Master of Divinity from an approved theological institution; [4] three years full time clergy experience after professional preparation; and [5] ecclesiastical endorsement by a recognized national endorsing body of their religious community. The District Court and the Court of Appeals for the 10th Circuit held that "the endorsement requirement provides ample safeguard that VA chaplains will be sufficiently trained to provide religious services the church, not the VA finds necessary." Murphy v. Derwinski, 990 F.2d 545.

That case is virtually on all fours with the case now before the Court. Whereas Murphy demonstrated all the qualifications, except ordination, Rev. Franklin demonstrated all the qualifications except the Master of Divinity and the completion of VA required pastoral experience after the completion of her theological education. On the other hand, she demonstrated that she possessed a bachelor's degree in social welfare, a Master of Human Relations, as well as a doctorate in "Theocentric Counseling" from an unaccredited institution. Further, she had many more than three years of service in counseling in virtually every field in which a clergy person is called upon to minister to other persons, including alcohol, drug abuse, family and marital relations. As in the Murphy case, the endorsement requirement provides ample safeguard that VA chaplains will be sufficiently trained to provide religious and theological ministry which the church, not the VA finds necessary

The Court of Appeals upheld the District Court's distinguishing Murphy from Franklin "because, unlike this case, Murphy involved specific evidence of disparate impact on a protected class." One reads Murphy in vain to find such evidence. The Murphy does say that the disparate impact

approach requires a showing that "a specific identifiable employment practice or policy caused a significant impact on a protected group." If one reads the facts, however, the only showing Murphy made was that her application was rejected and not processed.

There is undisputed evidence of disparate impact in the record. In the Affidavit of Chaplain Alton Keith Ethridge, the Government acknowledges "the under representation of women and minorities in the VA. (Appendix E, Ex. 9, p. 89B) Chaplain. The Magistrate found as an undisputed fact that women are underpresented as VA chaplains. (Appendix C, pp. 43-44)

Despite the admitted urgency, her application was refused. (Appendix C, p. 37) Rev. Franklin contends that, if women and minorities are sufficiently under represented to require appointment of monitors of affirmative action goals, a disparate impact is shown where the VA refuses to accept and consider the application of a single qualified woman. Murphy v. Derwinski, *supra*.

Where the Government has admitted that the imbalance is sufficient to cause it to take remedial efforts to achieve its correction, no further proof of its substantiality ought to be required, and none was in Murphy v. Derwinski, *supra*. That is particularly true in such cases as Murphy and Franklin, where the issue is not whether an application was fairly considered, but where the employing agency simply refused even to accept or process it. If Rev. Franklin is qualified, it cannot be controverted that a qualified woman was not permitted even to apply.

Franklin argues that the educational and experiential qualifications imposed by the VA are drenched in religion and theology, and, one their face, state an unconstitutional test. The

plaintiff is **not** required to prove that the defendant's stated reason was 'a pretext for discrimination against a protected class.' ***unless*** defendant articulates a legitimate nondiscriminatory reason for its refusal to hire. It is only ***after*** the defendant has articulated such a reason, does the plaintiff acquire the burden of proving that the stated reason was "a pretext for discrimination." Until then, she can rely on her *prima facie* case. Wards Cove Packing Co. v Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

Conceding for the purpose of this petition that the reason given by VA is nondiscriminatory, Ms. Franklin contends it cannot be 'legitimate" because it is unconstitutional on its face.

The only qualifications the VA claimed she lacked were religious, not secular. She possessed a master's degree in human relations and had enormous experience in counseling in drug and alcohol dependency, family problems, sexual conduct, and behavioral problems. Her life's experience was in hospitals and in the military. Her secular qualifications, which are the only kind the Government may assess, were superb. (Appendix E, Ex. 1, pp. 86-88)

It cannot be contended by the VA that Rev. Franklin was rejected because a better qualified applicant applied. The record is clear that Rev. Franklin's application was never considered. Thus, her qualifications were not weighed and found wanting in comparison with those of others. As in Murphy v. Derwinski, *supra.*, her qualifications were never weighed because the Agency concluded that "you do not meet the VA qualification requirements for chaplain."

It cannot be disputed that where an applicant for a public position is rejected because she lacks a Master of *Divinity* degree or sufficient course work in "*divinity, biblical studies, church history, biblical languages*, or *theology*", and because she lacks

three years *pastoral* experience after completion of professional preparation, religious tests are being imposed as a condition of public employment. On its face, therefore, Article VI of the Constitution of the United States applies:

> " . . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Torasco v. Watkins, 367 U.S. 488, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961)

In any number of cases, of some of which are cited below, this Court has made it clear that the First Amendment is designed, among other things, to prevent government from an "excessive entanglement with religion." Waltz v. Tax Commission of the City of New York, 397 U.S. 664, 25 L.Ed. 697, 90 S. Ct. 1409 (1970); Lemon v. Kurtzman, 403 U.2. 601, 29 L.Ed. 745, 91 S. CT.. 2105 (1971); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 37 L.Ed.2d 948, 93 S. CT.. 2955 (1973); Aguilar v. Fenton, 473 U.S. 402, 87 L.Ed.2d 290, 105 S. CT.. 3232 (1985).

Rev. Franklin contends that only churches may pass on the qualifications of clergy persons. Kedroff v. St. Nicholas Cathedral, *supra.*; Scharon v. St. Luke's Episcopal Presbyterian Hospital, 929 F. 2d 360 (C.A. 8th Cir. 1991); McClure v. Salvation Army, 460 F. 2d 553 (C.A. 5th Cir. 1972); Rayburn v. Conference of Seventh Day Adventists, 772 F. 2d 1164 (C.A. 4th Cir. 1985); Minsker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (CADC 1990). See, also Murphy v. Derwinski, *supra.*

Many of the cases cited above arose when an employee of a church or church related enterprise sought protection of employment rights under Title VII or ADEA. The employers

raised the First Amendment's Establishment Clause as a bar to these claims. In that context the Courts made it clear that "personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters" which secular courts may not review. "This is precisely the kind of judicial second-guessing of decision making by religious organizations that the Free Exercise Clause forbids." Scharon v. St. Luke's Episcopal Presbyterian Hospital, *supra*.

CONCLUSION

This Court should grant Claimant's Petition for Writ of Certiorari because the Court of Appeals decision conflicts sharply with numerous decisions of this Court, and because it conflicts as well with the case of Murphy v. Derwinski, *supra.*, earlier decided in the same circuit. Further, this case presents an interesting and important question of constitutional law in the area of church and state.

/s/
Daniel F. Lynch
Counsel of Record
925 E. 17th Avenue
Denver, Colorado 80218
303-830-7274

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Filed
United States Court of Appeals
Tenth Circuit - Feb 17, 1999
Patrick Fischer, Clerk

BARBARA FRANKLIN,	]	
	]	
Plaintiff-Appellant,	]	No. 97-1264
	]	
v.	]	(D.C. No. 96-S-1031)
	]	
DEPARTMENT OF VETERANS AFFAIRS,	]	(D. Colo.)
	]	
	]	
Defendant-Appellee.	]	

ORDER AND JUDGMENT

Before LUCERO, McKAY, and MURPHY, Circuit Judges.

Plaintiff Barbara Franklin appeals from a grant of summary judgment to Defendant in a case involving claims of race, gender, and age discrimination. Plaintiff is an African-

American woman who, at the time of alleged discrimination, was sixty-two years old. Since 1992, she has been a minister in the African Methodist Episcopal System, and, in 1993, she received a Ph.D. in Theocentric Counseling from LaSalle University. In May 1994, Plaintiff applied for a position as a chaplain with the United States Department of Veterans Affairs Medical Center in Denver, Colorado. She was endorsed by her church, a proper endorsing institution, for the chaplain position, and she served as a volunteer at the Denver VA Medical Center beginning in November 1993.

The National Chaplain Center in Hampton, Virginia, which reviews all applications for VA chaplain positions, rejected Plaintiff's application because she did not meet the educational and experience eligibility requirements for a VA Staff Chaplain. First, she did not have a Master of Divinity Degree[1] or some equivalent course work from an accredited university. LaSalle University apparently was not an accredited university, and Plaintiff's transcripts did not indicate course work in pastoral ministry, church history or world religions, and scriptural studies. Second, Plaintiff did not have the requiredt three years of post-graduate pastoral experience; she had less than one year of such pastoral experience. The reviewing chaplains determined that even if they waived one year of experience, which was the maximum waiver allowed, Plaintiff's experience still would be deficient by one year. After Plaintiff resubmitted her application and a new set of reviewers rejected it a second time, she brought

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1 According to the record, the nomenclature "Master of Divinity" replaced "Bachelor of Divinity" in the early 1970s. However, the two educational programs are the same and the graduate degree requirement has been in effect since at least in 1964. See Appellant's App. Doc. 6 at 58 n.l.

suit[2] against the VA. She claimed intentional discrimination and disparate impact based on her race and gender pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and 42 U.S.C. § 1981, and age discrimination pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.

After reviewing the magistrate judge's recommendation and Plaintiff's objections thereto, the district court granted summary judgment for Defendant. With respect to Plaintiff's claims of intentional discrimination, the district court concluded that Plaintiff could not establish a prima facie case because she was not qualified for the position. It also determined that, even if she were sufficiently qualified to establish a prima facie case, Defendant had articulated a legitimate, nondiscriminatory reason for its rejection of her application. Finally, the district court explained that "(w)hether or not Defendant's qualification criteria are unconstitutional, Plaintiff has not demonstrated that Defendant denied her the job because of intentional discrimination based on her age, race or gender." Appellant's App., Doc. 12 at 228. As for the disparate impact claims, the district court determined that Plaintiff did not establish a prima facie case because she did not present "any evidence, statistical or

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2 In her returned application, Plaintiff found a note stating her name, age, and regional location. In response to a letter of complaint from Plaintiff's attorney, the Deputy Director of the Chaplain Center directed Plaintiff to resubmit her application for review by a new set of examiners. Additionally, an investigation was conducted into the origin of the note. The investigation revealed that the Program Assistant for Personnel for the Chaplain Center had written the note, but that she had no responsibility for the selection of chaplains, she did not intend her notation to have any effect on the selection, and, in any event, she considered Plaintiff's age to be a favorable factor. See Appellant's App., Doc. 6 at 119 Doc. 12 at 227.

otherwise, that shows Defendant's qualification criteria caused a significant disparate impact on a protected group." Id. At 230.

On appeal, Plaintiff principally argues that the VA's educational and experience standards violated the First Amendment constraints on religious tests for public positions. She therefore claims that because Defendant relied on these unconstitutional standards to articulate its legitimate, nondiscriminatory reason for rejecting her application, that reason is not legitimate and the trial court erred in granting summary judgment to Defendant.

We review a court's decision on summary judgment de novo, applying the same legal standard used by the district court pursuant to Federal Rule of Civil Procedure 56(c). See *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment' If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the district court." *Wolf*, 50 F.3d at 796 (internal citation omitted).

Our review of the record and applicable law leads us to conclude that the trial court was correct when it essentially concluded that Plaintiff had presented no evidence that would establish any nexus between the rejection of her application and race, gender, or age. The court reached this conclusion as to both her intentional discrimination claims and her disparate impact claims. In analyzing the disparate impact claims, for example, the court stated that "(t)he evidence does not establish any connection between Defendant's qualification criteria and a substantial adverse effect on women, African-Americans, or

people over (forty) years of age." Appellant's App., Doc. 12 at 230 n.2. Further, the court properly distinguished *Murphy v. Derwinski*, 776 F. Supp. 1466, 1470 (D. Colo. 1991), aff'd. 990 F.2d 540, 547 (10th Cir. 1993), on which Plaintiff heavily relied because, unlike this case, *Murphy* involved specific evidence of disparate impact on a protected class. See Appellant's App., Doc. 12 at 230-31. Also worth nothing is the court's determination that the only piece of evidence offered for the age discrimination claim, the notation of Plaintiff's age on a piece of paper in her returned application, did not constitute evidence of intentional discrimination. See id. at 227.

As a result we AFFIRM for substantially the same reasons set forth in the district court's Order filed May 20, 1997.[3]

Entered for the Court

February 17, 1999

/s/ Monroe G. McKay
Monroe G. McKay
Circuit Judge

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3 Because we agree with the district court's analysis and conclusion, we do not address the constitutional or jurisdictional questions raised in the briefs and at oral argument.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Case No. 96-CV-1031

BARBARA G. FRANKLIN,

Plaintiff,

v.

JESSIE BROWN, Secretary,
Department of Veterans Affairs,

Defendant.

Filed
United States District Court
Denver, Colorado
] May 20, 1997
] James R. Manspeaker
] Clerk
] By unintelligible
] **ORDER**

THIS MATTER comes before the court on the Recommendation of United States Magistrate Judge that Plaintiff's Motion for Summary Judgment (filed January 30, 1997) be denied and Defendant's Motion for Summary Judgment (filed January 31, 1997) be granted. The Recommendation was issued on April 22, 1997 and served by mail on April 22, 1997. On May 12, 1997, Plaintiff moved for an extension of time to file her objections to the Recommendation as prescribed by U.S.C. § 638(b)(1) and Fed. R.. Civ. P. 72(b). On May 13, 1997, Plaintiff filed her Objection tp Recommendation of United States Magistrate Judge. The court must make a *de novo* determination of those portions of the proposed findings or recommendations to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court has reviewed the motions, the Plaintiff's

response (filed February 10, 1997), the Defendant's combined response and reply (filed February 28, 1997), the amicus brief (filed March 13, 1997), the Plaintiff's reply (filed March 24, 1997), the Recommendations (filed April 22, 1997), the Plaintiff's Objection (filed May 13, 1997), the exhibits and affidavits, the entire case file, and the applicable law and is fully advised in the premises.

1. Standard of Review

The very purpose of a summary judgment motion is to assess whether trial is necessary. White v. York Int'l Corp., 45 F.3d 357 (10th Cir. 1965). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir. 1991).

The moving party bears the initial burden of showing that there is an absence of any genuine issues of material fact. Celotex Corp. v Catrett, 477 U.S. 317, 335 (1986); Hicks v. City of Wotonga, 942 F.2d 737 (10th Cir. 1991). A "material" fact is one which might affect the outcome of the suit under governing law. An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. Anderson, 477 U.S. at 248. The movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim. Celotex, 477 U.S. at 325; John Hancock Mut. Life Ins. Co. v. Weisman, 27 F.3d 500, 503 (10th Cir. 1994); Universal Money Ctrs, Inc. v. AT&T, 22 F.2d 1527, 1529 (10th Cir.), *cert. denied*, 115 S.Ct. 655 (1994). If the moving party meets the burden, the non-moving party may not rest upon its pleadings, but must come forward with specific facts showing

that there is a genuine issue for trial as to the elements essential to the non-moving party's case. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256; Matsushita Elec. Indus., Inc. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus. Inc. v. Arvus Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991); Applied Genetics Int's v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir., 1980).

In applying the summary judgment standard, the court construes the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1459, 1503 (10th Cir. 1994); Deepwater Inv., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 Cir. 1991). However, the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. FDIC v. Hulsey, 22 F.3d 1472, 1481 (10th Cir. 1994) (emphasis in original). To constitute a genuine factual dispute, there must be more than a scintilla of evidence; summary judgment may be granted if the evidence is merely colorable or is not significantly probative. "[T]he relevant inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Bingaman v. Kansas City Power & Light Co., 1 F.3d 976, 980 (10th Cir, 1993) (quoting Anderson, 477 U.S. at 251-252).

2. Background

The court incorporates by reference the undisputed facts outlined in the Recommendation. (Recommendation pp.2-4).

Plaintiff's complaint alleges discrimination in the basis of race and gender pursuant to the Title VII of the Civil Rights Act,

of 1964, as amended, 42 U.S.C. § 621 et seq.[1] Plaintiff complains that Defendant's eligibility standards for the job of VA Staff Chaplain discriminate against her and have a disparate impact on the protected classes to which she belongs: African Americans, females, and people over the age of forty. (Complaint ¶ 10.).[2] While Plaintiff argues many points, Plaintiff also indicates that the case presents only one substantial issue: whether Plaintiff was qualified for the job in question. (Plaintiff's Verified Response to Defendant's Motion for Summary Judgment p. 4).

Defendant argues that Plaintiff cannot establish a prima facie case of employment discrimination because she was not qualified for the position at issue. Defendant also argues that Plaintiff's lack of qualifications provides a legitimate, nondiscriminatory reason for not hiring her and that Plaintiff

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1 "In a case under Title VII and § 1981 arising out of the same facts, the commonality of fdactual issues between the § 1981 and Title VII claims is nearly all-encompassing. The elements of each cause of action have been construed as identical, and a jury verdict on the issue of liability . . . under § 1981 is normally conclusive on the issue of liabuility in a parallel action under Title VII." Thomas v. Denny's, Inc., No. 95-5146 slip op. (10th Cir. (Okla) April 25, 1987) (quoting Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988) (per curium).

2 "In a case under Title VII and §1981 arising out of the same facts, the commonality of factual issues between the § 1981 and Title VII claims is nearly all-compassing. The elements of each cause of action have been constructed as identical, and a jury verdict on the issue of liability ...under §1981 is normally conclusive on the issue of liability in a parallel action under Title Vii." Thomas v. Denny's, Inc. No. 95-5146 slip op. At 15 (10th Cir. (Okla.) April 25, 1997) quoting Skinner v. Total Petroleum, Inc. 859 F.2d 1439, 1444 (10th Cir. 1988) (per curiam).

cannot meet her burden on summary judgment to show that this legitimate reason was a pretext for discrimination.

3. Analysis

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;..."42 U.S.C.§ 2000e-2(a)(1). "Title VII was enacted to ensure equality of employment opportunities and to eliminate those practices and devices that have historically discriminated on the basis of race, sex, color, religion, or national origin." .Livingston v. Roadway Exp., Inc., 802 F.2d 1250, 1251 (10th Cir. 1986), citing McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). Likewise, the ADEA makes it unlawful for an employer to fail or refuse to hire an individual because of his or her age. 29 U.S.C.§ 621 et. Seq. Similarly, § 1981 prohibits the denial of the full and equal benefit of all laws on the basis of race.

The Supreme Court has established, and the Tenth Circuit has repeatedly adopted, a three-party test to determine whether a plaintiff has established a prima facie case under Title VII for employment discrimination. Initially, a plaintiff must show that: (1) she belongs to a protected class; (2) she applied for and was qualified for an available job; (3) she was rejected despite being qualified; and (4) the position remained open as the employer continued to search for applications or the position was filled by a person not of the protected class. Texas Dep't of Community Affairs v. Burdeni, 450 U.S. 248, 253-54 (1981) York v. American Telephone & Telegraph, 95 F.3d 948, 954 (10th Cir. 1996) (quoting McDonnell Douglas, 422 U.S. at 802); Randle v. City of Aurora, 69 F.3d 441, 451 n. 13 (10th Cir. 1995) (citing McDonnell Douglas, 411 U.S. at 802). This analytical framework applies as well to claims under 52 U.S.C. § 1981. Thomas No. 95-5146 slip op. At 7 (citation omitted).

The ADEA specifically prohibits discriminatory decisions not to hire because of someone's age. Ellis, 73 3d at 1007 (emphasis in original). To prevail on an ADEA claim, a plaintiff must establish that age was a determining factor in the employer's challenged decision. Greene v. Safeway Stores, Inc., 98 F.3d at 554, 557 (10th Cir. 1996) (quotation marks and citations omitted). An ADEA plaintiff may carry the burden of making his or her case by presenting direct or circumstantial evidence that age was a determining factor or, more typically, a plaintiff may rely on the proof scheme for a prima facie case established in McDonnell Douglas, 411 U.S. at 802-04. Greene, 98 F. 3d at 557 (quotation marks and citations omitted.)

Once the plaintiff meets the burden of presenting a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the decision which adversely affected the employee. E.E.O.C. v. Flaher Company, Inc., 986 F.2d 1312, 1316 (10th Cir. 1992) (citation omitted). Once the defendant has set forth a facially nondiscriminatory reason for the decision, the plaintiff assumes the burden to prove that the employment decision was the result of intentional discrimination based on an impermissible motive, id. The plaintiff can prevail either directly by proving that the employer acted with a discriminatory motive or indirectly by showing that the stated reason was a pretext for discrimination prohibited by Title VII. Martin v. Nannies and the Newborns, Inc., 3 F.3d 1410, 1417 10th Cir. 1993 (citations omitted); Shapolia v. Los Alamos Nat'l Laboratory, 992 F.2d 1033, 1036-37 (10th Cir. 1993) (citation omitted); Drake v. City of Fort Collins, 927 F.2d 1156, 1159-61

Allegations of discrimination must be supported by facts indicating purposeful discrimination. General Bldg. Contractors Ass'n Inc. v. Pennsylvania, 458 U.S. 375, 389-91 (1982); Durham v. Xerox Corp., 18 F.3d 836, 839 (10th Cir.,) cert. Denied, 513 U.S. 819 (1994). A plaintiff may prove intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or

indirectly by showing that the employer's proffered explanation is unworthy of credence." E.E.O.C. v. Wiltel, Inc., 81 F.3d 1508, 1513 (10th Cir. 1996), citing United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983) (internal quotation marks and citation omitted). "[W]hen a plaintiff in a Title VII case (directly) proves that [discrimination] played a motivating part in an employment decision, the defendant may void a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory reason." Wiltel, Inc. 81 F.3d at 1514 (quoting 490 U.S. 228, 258 (1989).Price Waterhouse v. Hopkins.

The Tenth Circuit has "previously examined the difference between direct evidence of discriminatory intent and circumstantial evidence that discrimination may have played a part in an employment decision." Wiltel, Inc., 81 F.3d at 1514 (citations omitted); see also Heim v. State of Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993). "[E]vidence of 'an existing policy which itself constitutes discrimination' is direct evidence of discrimination." Wiltel, Inc. 81 F.3d at 1514 (quoting Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir.1990), cert. denied. 506 U.S. 907 (1992) citation omitted). "In contract...statements which are merely expressions of personal opinion or bias do not constitute direct evidence of discrimination." Wiltel, Inc. F.3d at 1514 (citing Heim, 8 F.3d at 1546-47. "Because such statements require the trier of fact to infer that discrimination was a motivating cause of an employment decision, they are at most circumstantial evidence of discriminatory intent." Wiltel, Inc., 81 F.3d at 1514 (citations omitted).

a. Intentional Discrimination

First, the court agrees with the Recommendation that Plaintiff cannot make a prima facie case of employment discrimination because she is not qualified for the job at issue. (See Exhibits 6, 7, 8, 9, 10, 11, 12, 17, 18, 19 to Defendant's

Motion for Summary Judgment). Plaintiff did not have a Masters of Divinity Degree, nor did she have course work equivalent to a Masters of Divinity Degree. Plaintiff concedes that the University from which Plaintiff received her profes-sional degree was not accredited. (See also Exhibit 2 to Defendant's Combined Response and Reply). Plaintiff did not have the required three years of pastoral experience after her degree. An unqualified applicant cannot establish a prima facie case. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1275-76 (9th Cir. 1981).

Next, even if Plaintiff had made a prima facie case for employment discrimination, Defendant has articulated Plaintiff's lack of the necessary educational credentials and pastoral experience as legitimate, nondiscriminatory reasons for the hiring decision. "The defendant's burden is merely to articulate through some proof facially nondiscriminatory reason...;the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion." Flasher, 986 F.2d at 1316. The ultimate burden of persuasion that Defendant intentionally discriminated against Plaintiff remains at all times with Plaintiff. Plaintiff has failed to demonstrate that the articulated reasons for not hiring Plaintiff are unworthy of belief. Plaintiff has not shown that Defendant's articulated justifications for hiring decisions are pretextual.

The only evidence of intentional discrimination presented by Plaintiff is the notation of Plaintiff's age made by Ms. Johnston (Exhibit 13 to Defendant's Motion for Summary Judgment). First, even if the court were to conclude that this is evidence of intentional discrimination, the chain of causation between any discriminatory motivation and the hiring decision was broken by the remedial steps taken by Defendant after Plaintiff complained about the note. Defendant permitted Plaintiff to resubmit her application and her application was considered anew by a new set of reviewers who had no knowledge of the previous application

of the notation by Ms. Johnston. (Exhibits 16, 17, 18, 19, 20, 21 to Defendant's Motions for Summary Judgment). Second, age-related comments by non-decision makers are not material in showing an employer's action was based on age discrimination. Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994). The evidence is undisputed that Ms. Johnston was not a decisionmaker. (Exhibit 14 to Defendant's Motion for Summary Judgment). Third, the evidence indicates that Ms. Johnston's notation was considered by her to be in Plaintiff's favor. The age notation does not constitute evidence of intentional discrimination.

In further response to the Defendant's argument, Plaintiff asserts that Defendant's qualification criteria are unconstitutional as violative of the Establishment Clause of the First Amendment and Article VI of the U.S. Constitution because they impose a religious test for a federal office. However, the court need not reach the constitutional issue in order to resolve the claims in the Plaintiff's complaint. "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." Jean v. Nelson, 472 U.S. 846, 854 (1985) (Internal quotation marks and citations omitted). "[C]ourts normally avoid resolution of constitutional issues when the case may be decided on nonconstitutional grounds." Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 438 n. 5 (10th Cir. 1990) (citing Jean, 472 U.S. at 554).

The Plaintiff's complaint raises allegations of age, gender, and race discrimination under Title VII, § 1981 and the ADEA. Each of these three statutes prohibits only intentional discrimination based upon an employee's protected class characteristics. Flasher, 986 F.2d at 1319 (emphasis in original). A plaintiff must prove that the decision was based upon his or her protected characteristics rather than upon the valid nondiscriminatory reason or upon no particular reason at all. Flasher, 986 F.2d at 1316. Whether or not Defendant's qualification criteria are unconstitutional, Plaintiff has not

demonstrated that Defendant denied her the job because of intentional discrimination based upon her age, race, or gender. Defendant need not at this stage litigate the merits of the reasoning, nor does Defendant need to prove that the reason relied upon was bona fide. Flasher, 986 F.2d at 1316. "[J]ust because the reasoning relied upon for a certain action is mistaken does not mean that the reason is pretextual." Randle, 69 F.3d at 455. Even if the court were to assume that the Defendant's qualification criteria were unconstitutional, Plaintiff's claims fail because she cannot meet her burden on summary judgment to show that the Defendant's stated reason was "a pretext for discrimination against a protected class." Flasher, 986 F.2d at 1321 (emphasis in original).

b. Disparate Impact

In addition to her assertions of intentional discrimination, Plaintiff alleges the Defendant's qualification criteria for the job at issue have a disparate impact on the protected classes to which she belongs. "Disparate impact claims, as recognized in the Title VII context . . . challenge employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Ellis, 83 F.3d at 1006 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)). To establish a prima facie case of disparate impact, the plaintiff must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group. Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1426 (citing Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir. 1991)). Statistics may be used by the plaintiff to establish a prima facie case of disparate impact. Faulkner, 3 F.2d at 1428 (citing Wards Cove Packing Co. V. Antonio, 490 U.S. 642, 650 (1989), but a plaintiff must show more than mere statistical disparities. Smith v. Denver Public School Board, 767 F.Supp. 226, 229 (D. Colo. 1991), The plaintiff must also indemnify an employment practice responsible for an observed disparate impact. Wards Cove, 490

U.S. at 657. Once an employment practice has been identified, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice has caused the disparate impact on members of a protected group. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

A plaintiff who succeeds in establishing a prima facie case of disparate impact does not automatically survive a motion for summary judgment. MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1121 (10th Cir. 1991) (citations omitted). Once a plaintiff establishes a prima facie case, the burden shifts to the employer to produce evidence demonstrating "business justification" for its employment practices. Faulkner, 3 F.3d at 1428 (citing Wards Cove at 658). A business justification proffered by an employer must have a manifest relationship to the employment in question. Faulkner, 3 F.3d at 1429 (citations omitted). An employer satisfies the burden of production by presenting its reasons for the challenged actions with sufficient specificity to allow the plaintiff to demonstrate pretext. Faulkner, 3 F.3d at 1434, citing Pitre v. Western Electric Co., 843 F.2d 1262, 1265-66 (10th Cir. 1988). If the employer presents such evidence, the plaintiff may still prevail if he or she can persuade the factfinder that other tests or selection devices, without a similarly undesirable disparate effect, would also serve the employer's legitimate interests. Faulkner, 3 F.3d at 1428-29 (citations omitted).

Courts "are not in the position of determining whether a business decision was good or bad." Sanchez v. Philip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993) (citations omitted). "An employer's business judgment is relevant only insofar as it relates to the motivation of the employer with respect to the allegedly illegal conduct. Id. (citations omitted). 'Title VII is not violated by the exercise of erroneous or even illogical business judgment." Id. (citations omitted). "Employers are given wide discretion in

setting job standards and requirements and in deciding whether applicants meet those standards." York, 95 F.3d at 954 (quoting

Hickman v. Flood & Peterson, Ins., Inc., 766 F.2d 422, 425 (10th Cir. 1985)). "As long as the qualifications offered by the employer are reasonable and have been consistently applied to all applicants for the position, . . . there is no reason for the fact finder to supplant the employer's list of qualifications with its own." York, 95 F.3d at 954.

Plaintiff has not established a prima facie case of disparate impact. The only evidence before the court is that Defendant's qualification standards adversely affect Plaintiff. "A sample of one is too small to demonstrate significant impact." Drake, 927 F.2d at 1181. Plaintiff has not presented any evidence, statistical or otherwise, that shows Defendant's qualification criteria caused significant disparate impact on a protected group. An employer cannot be held liable for just any disparity in its workforce. Watson, 467 U.S. 994-95. Defendant has no control over the number of female minority applicants with the required experience. The evidence does not establish any connection between Defendant's qualification criteria and a substantial adverse effect on women, African-Americans, or people over 40 years of age.

Defendant has also presented a facially nondiscriminatory reason for its hiring decision. Plaintiff likens this case to Murphy v. Derwinski, 776 F. Supp. (D. Colo. 1991), *aff'd*, 990 F.2d 540 (10th Cir. 1993). However, in Murphy, the defendant did not dispute that the regulation at issue adversely affected women, who could not be ordained as Catholic priests, by making them ineligible for the position of VA chaplain. 776 F.Supp. At 1470. The court determined that other nondiscriminatory selection criteria would serve the defendant's business necessity as well. 776 F.Supp. At 1472-73. Here, there is no evidence that the qualification criteria adversely affect women. Nor is there any evidence before the court that some other selection criteria without a disparate impact, would also serve the employer's

legitimate interests. In fact, the Tenth Circuit found that "with the ordination requirement gone, the VA's own policies will not prevent women from competing . . ." Murphy, 990 F.2d at 547.

4. Conclusion

At most, Plaintiff has demonstrated that she disagrees with the hiring decision made by Defendant. Plaintiff has not shown that Defendant's hiring decision was based on an improper motive. Plaintiff has failed to meet her burden of proving by a preponderance of the evidence that she was discriminated against based on her race, gender, or age.

Accordingly, IT IS ORDERED:

1. The Recommendation of United States Magistrate Judge is ACCEPTED.

2. Plaintiff's Motion for Summary Judgment is DENIED.

3. Defendant's Motion for Summary Judgment is GRANTED. Judgment on the complaint shall enter in favor of Defendant and against the Plaintiff.

4. Upon submission of a bill of costs to the Clerk of the Court within ten (10) days of the date of this Memorandum Opinion and Order, the Defendant shall be entitled to costs pursuant to statute

DATED at Denver, Colorado this 20th day of May, 1997.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96 S 1031

BARBARA G. FRANKLIN,

Plaintiff,

v.

JESSE BROWN, Secretary,
Department of Veterans Affairs,

Defendant.

Filed
United States District Court
Denver, Colorado
Apr 22, 1997
James R. Manspeaker, Clerk

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

O. Edward Schlatter, United States Magistrate Judge

This matter is before the court on the plaintiff's motion for summary judgment, filed January 30, 1997, and the defendant's motion for summary judgment, filed January 31, 1997. Pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B), and FED. R. Civ. P. 72(a) and (b), these motions have been referred to Magistrate Judge O. Edward Schlatter. For the reasons discussed below, I recommend that the defendant's motion for summary judgment be granted, and that the plaintiff's motion for summary judgment be denied.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See, e.g., Redmon v. United States, 934 F.2d 1151, 1155 (10th Cir. 1991). Summary judgment may be granted if the court concludes that no "rational trier of fact" could find for the nonmoving party based on the showing made in the motion and response. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). After the moving party has come forward with the motion showing no issue of fact for trial, the party resisting a summary judgment motion must "come forward with specific facts showing that there is a genuine issue for trial." Id. the court must view the evidence and its reasonable inferences in the light most favorable to the party who opposes the motion for summary judgment. Palermo v. First National Bank and Trust Co., 894 F.2d 363, 365 (10th Cir. 1990).

FACTS

The facts relevant to the motions for summary judgment are not disputed. The plaintiff, Barbara Franklin, brought this case pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.SC. §§ 621-31, and pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). She alleges that she suffered age, sex, and race discrimination when she was not hired as a chaplain with the Department of Veterans Affairs Medical Center in Denver, Colorado (DVAMC), a facility operated by the Department of Veterans Affairs (VA).

Rev. Franklin is an African-American female. In September 1992, Rev. Franklin was ordained as a minister in the African Methodist Episcopal System, a religious denomination recognized by the VA as a proper sponsor of chaplains. Rev. Franklin received a PhD in Theocentric Counseling from LaSalle University on July 6, 1993. LaSalle University is not an

accredited university. Beginning in November 1993, she worked as a volunteer with the DVAMC chaplains for about one year. On May 10, 1994, less than one year after receiving her PhD, she applied for a position as Staff Chaplain at the VAMC. At that time, she was 62 years old.

The VA had minimum requirements for experience and education for the position of chaplain. Among these were: 1) a bachelor of arts and bachelor of divinity or sacred theology degree, as evidenced by a transcript of credits form an accredited college, university, or theological institution, or some equivalent of such education, and; 2) at least 3 years experience in which the principal duty was a clergyman, after completion of professional preparation, and which demonstrated a background of practical pastoral knowledge and skill, or its equivalent. At the time of Rev. Franklin's application, the National Chaplain Center in Hampton, Virginia reviewed all applications for chaplain positions, and compiled a list of qualified applicants, which was then sent to the hiring officials at the appropriate field office, typically a VA hospital.

Rev. Franklin's application was reviewed by Chaplains Michael McCoy and William Kinniard. Defendant's exhibits 6 and 7. Chaplains McCoy and Kinniard determined that Rev. Franklin was not qualified for the chaplain position for two reasons. First, she did not have a masters of divinity degree or some equivalent course work. Defendant's exhibit 6, 15. The chaplains reviewed her transcripts in detail and concluded that she did not have sufficient course work in areas such as pastoral care, biblical studies, and church history, to be considered to have the equivalent of a masters of divinity. Defendant's exhibits 6; 8; 10. In addition, Chaplains McCoy and Kinniard determined that LaSalle University was not an accredited university, as required by VA regulations. Defendant's exhibit 6, 16; exhibit 11. Finally, Chaplains McCoy and Kinniard determined that Rev. Franklin did not have the required three years of pastoral experience beyond

her professional degree, and that there was no basis for a waiver of this requirement. Defendant's exhibit 6, 17. After this review, Rev. Franklin was told that her application would not be considered because she was not qualified for the position. The reasons outlined above were discussed in a letter to Rev. Franklin. Defendant's exhibit 12. Her application was returned to her.

Among the pages of the returned application was a note written by Mary Johnston, Program Assistant for Personnel for the Chaplain Center. The note said, in part, "Barbara Franklin (62 year-old) - Denver." Defendant's exhibit 13. Ms. Johnston did not have responsibility for the selection of chaplains. Defendant's exhibit 14, 15. On August 6, 1994, Rev. Franklin's attorney, Daniel Lynch, sent a letter to the VA complaining about the notation of Rev. Franklin's age. In response, the Deputy Director of the Chaplain Center allowed Rev. Franklin to re-submit her application, for review by a new board of examiners. In addition, an investigation into the origin of the note was conducted. Rev. Franklin resubmitted her application. Rev. Franklin's application was reviewed by two chaplains who were not involved in the first review, Chaplains Ethridge and Lauer. They came to the same conclusions as Chaplains McCoy and Kinniard. Defendant's exhibit 20. Rev. Franklin's application again was returned to her. A Caucasian male, who was younger than Rev. Franklin, was hired to fill the position she had applied for.

I. PRIMA FACIE CASE - AGE, SEX. RACE DISCRIMINATION

When a plaintiff does not have direct evidence of discrimination, as Rev. Franklin does not, she may establish a prima facie case by establishing elements set forth by the Supreme Court in McDonnell-Douglas v. Green 411 U.S. 792 (1973). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for

the decision not to hire. If the defendant meets this burden, then the plaintiff must prove that the stated "reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff." Sorenson v. City of Aurora, 984 F.2d 349, 353 (10th Cir. 1993). Once the defendant has set forth a facially nondiscriminatory reason for its action, the presumption in favor of the plaintiff which arose from the establishment of a prima facie case simply drops from the case. EEOQ v. Flasher Co. Inc., 986 F.2d 1312, 1316 (1 Oth Cir. 1992). In other words, the plaintiff has the burden of proving intentional discrimination. As an alternative to proving intentional discrimination, the plaintiff can demonstrate that the defendant's policies have a disparate impact on a protected group. Drake v. City of Fort Collins, 927 F. 2d 1156 (10th Cir. 1991).

In order to establish a prima facie case of improper discrimination on the basis of age, the plaintiff must show: 1) that she was within a protected age group; 2) that she applied for and was qualified for an available position; 3) that she was adversely affected by the employer's decision, and; 4) that a younger person was hired for the position. See, e.a., Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir. 1995). A prima facie case of sex or race discrimination may be established by showing that: 1) the plaintiff is a member of a protected class; 2) the plaintiff was qualified for the position at issue; 3) the defendant made an employment decision adverse to the plaintiff, and; 4) the person hired was not a member of the protected class. See, e.g., Portis v. First Nation Bank of New Albany, 34 F.3d 325, 328 n.6 (5th Cir. 1992). In this case, the only one of these elements which is disputed is whether or not Rev. Franklin was qualified for the chaplain position. It is not disputed that Rev. Franklin meets all of the other elements of a prima facie case.

The defendant seeks summary judgment on two bases. First, the defendant argues that the undisputed facts in the record demonstrate that Rev. Franklin was not qualified for the position

at issue. Therefore, she cannot establish a prima facie case of discrimination on the basis of race, sex or age. Second, the defendant argues that Rev. Franklin has not come forward with any significant evidence of intentional discrimination or disparate impact. Whether or not the defendant has come forward with a legitimate, nondiscriminatory reason for not hiring Rev. Franklin, it remains Rev. Franklin's burden to establish that the decision not to hire her was based on intentional discrimination, or disparate impact. According to the defendant, Rev. Franklin's lack of qualifications is a legitimate, non-discriminatory reason for not hiring her. Again, when the defendant provides such a reason, the plaintiff then must come forward with some evidence of intentional discrimination or disparate impact in order to establish a prima facie case. According to the defendant, there is no such evidence in the record.

Rev. Franklin also argues that she is entitled to summary judgment, based on the undisputed facts in the record. Again, it is undisputed that Rev. Franklin satisfies all of the elements of a prima facie case, except for the qualification element. Rev. Franklin claims the defendant's qualification criteria, requiring certain education and experience, are unconstitutional. She argues that these requirements violate the Establishment Clause of the First Amendment, and Article VI of the Constitution. Therefore, she claims these requirements may not properly be applied to her. She says the only qualification the defendant properly may apply to her is that she be endorsed by a religious denomination. Rev. Franklin is so endorsed.

The defendant argues that this court should not address the constitutional issues raised by Rev. Franklin because this case can be decided on more narrow, statutory grounds. See, e.g., Jean v. Nelson, 472 U.S. 846, 854 (1985). That is, Rev. Franklin has no significant evidence of intentional discrimination or disparate impact as a result of the defendant's hiring qualifications. In other words, the defendant argues that even if one assumes the

defendant's qualification criteria are unconstitutional, the defendant still is entitled to summary judgment because Rev. Franklin has presented no evidence of intentional discrimination or disparate impact. On the other hand, Rev. Franklin says the constitutional issue is the key question in this case, and that she does have sufficient evidence of intentional discrimination and disparate impact.

For the reasons discussed below, I conclude that the defendant's motion for summary judgment should be granted, and that Rev. Franklin's motion for summary judgment should be denied. The primary basis for granting summary judgment to the defendant is that Rev. Franklin has not come forward with any significant evidence of intentional discrimination or disparate impact. Absent such evidence, Rev. Franklin is not entitled to relief under Title VII or the AIDEA. As suggested by the defendant, this is a narrow, statutory ground on which all of Rev. Franklin's claims can be resolved.

The second, and alternative basis for granting summary judgment to the defendant is that Rev. Franklin was not qualified for the position at issue. A determination that Rev. Franklin was not qualified involves an examination of the propriety of the qualification criteria applied by the defendant. I conclude that these criteria were constitutional and proper. It is undisputed that Rev. Franklin did not meet these criteria. In other words, even if there were some evidence of intentional discrimination or disparate impact, the defendant still would be entitled to summary judgment because Rev. Franklin was not qualified for the position at issue.

II. LEGITIMATE, NON-DISCRIMINATORY REASON

Rev. Franklin claims that the defendant has not advanced a legitimate, nondiscriminatory reason for not hiring her. Again, the defendant says Rev. Franklin was not qualified for the position.

Rev. Franklin says the defendant's qualification criteria are not legitimate because they are unconstitutional. If the defendant has not advanced a legitimate, non-discriminatory reason for its challenged actions, there remains a presumption in favor of the plaintiff that the defendant's motive was improper. If the defendant has advanced an appropriate reason, this presumption falls away.

At this stage of Title VII and ADEA analysis, the defendant need only articulate a reason that is not, on its face, prohibited by Title VII or the ADEA. EEOC v. Flasher Co. Inc., 986 F.2d 1312, 1315-16 n. 4 (10th Cir. 1992). These acts only prohibit discrimination on the basis of age, race color, religion, sex, or national origin. Rev. Franklin alleges discrimination on the basis of sex, age and race. At this stage, the defendant need not establish the merits of the reason, that the reason was bona fide, or that the reason was applied in a nondiscriminatory fashion. Id., at 1315. Here, the reason advanced by the defendant, Rev. Franklin's lack of certain educational credentials and experience, does not, on its face, violate Title VII or the ADEA. Even if the reason might be found to be improper on some other basis, the reason satisfies the defendants burden of production because the reason advanced does not violate Title VII or the ADEA. Therefore, it is appropriate to proceed to the third stage of the McDonnell-Douglas analysis: Whether there is any evidence of intentional discrimination or disparate impact.

III. INTENTIONAL DISCRIMINATION OR DISPARATE IMPACT

A Title VII plaintiff always has the burden of proving intentional discrimination by the defendant, or disparate impact as a result of the defendant's employment policies. The defendant asserts that there is no evidence of intentional discrimination or disparate impact in the record. In the absence of such evidence, the defendant is entitled to summary judgment.

A. Intentional Discrimination

The only evidence Rev. Franklin has cited to support her claim of intentional discrimination is the note written by Mary Johnston, which mentions Rev. Franklin's age. Defendant's exhibit 13. This note, without more, is not sufficient to create a disputed issue of fact on the defendant's intent. It is undisputed that Ms. Johnston did not play a substantive role in the employment action at issue. An arguably discriminatory statement made by her does not support a finding of discrimination. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (statements made by nondecision makers do not satisfy the plaintiff's burden of showing discriminatory animus); Merrick v. Farmers Ins. Group., 892 F.2d 1434, 1438 (9th Cir. 1990) (stray or isolated comments unsupported by other evidence of discriminatory motivation does not create triable issue).

In addition, after Rev. Franklin complained about the notation of her age by Ms. Johnston, the defendant undertook timely and adequate measures to correct any possible impropriety. Alleged discriminatory conduct is not actionable when the defendant employer, once informed about the allegedly discriminatory conduct, takes adequate steps to deal with the problem. See, e.g., Herschfeld v. New Mexico Corrections Dep't., 916 F. 2d 572 (10th Cir. 1990); Ebert v. Lamar Truck Plaza., 878 F. 2d 338, 339 (10th Cir. 1989). Again, Rev. Franklin was permitted to resubmit her application, and her application again was considered by a new set of reviewers, after she complained about the age note. These remedial actions were timely and sufficient. The age note does not provide any evidence of intentional discrimination, and there is no other evidence of intentional discrimination in the record.

B. Disparate Impact

The premise of the disparate impact theory is that some

employment practices, adopted without a deliberately discriminatory motive, may be functionally equivalent to intentional discrimination. Drake v. City of Fort Collins, 927 F.2d 1156, 1161 (10th Cir. 1991). A plaintiff asserting a disparate impact claim must show that a specific hiring practice has a substantial adverse impact on a group protected by Title VII. Id. This is usually done by showing "that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." Lowe v. City of Monrovia, 775 F.2d 998, 1004 (9th Cir. 1985), citing Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983). Whether a disparate impact claim can be asserted under the ADEA is subject to some doubt. For the purpose of this recommendation, I will assume, without deciding, that disparate impact can be asserted under the ADEA.

To establish a prima facie case of disparate impact, the plaintiff must: 1) identify the specific employment practice which causes a disparate impact on the relevant class, and; 2) prove a causal connection between that practice and the disparate impact. The proper comparison in a disparate impact case is a comparison between the race, sex, and/or age composition of the jobs at issue and the race, sex, and/or age composition of the qualified population in the relevant labor market. Wards Cove Packing Company, Inc. v. Antonio, 490 U.S. 642, 650- 51 (1989). When there is an imbalance between the number of qualified applicants in a class and the number of class members holding such jobs, the plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact." Wards Cove, 490 U.S. at 656. If there is a dearth of qualified members of the relevant class, for reasons which are not the defendant's fault, the defendant's employment practices cannot be said to have caused a disparate impact on that class. Wards Cove, 490 U.S. at 651-52.

Here, the defendant concedes that women are under-represented

in the VA chaplaincy. Defendant's motion for summary judgment, p. 5, ¶ 12. Rev. Franklin claims that the defendant's practice of requiring that chaplains have 3 years of relevant experience after obtaining their degree contributes to an imbalance between the number of women chaplains, and the number of qualified women chaplains. Plaintiff's response to defendant's motion for summary judgment, pp. 3- 4. Rev. Franklin says her ordination was delayed because, until later in her life, women of her denomination were not permitted to study for ordination. Plaintiff's response to defendant's motion for summary judgment, According to Rev. Franklin, this fact makes it more difficult for women to meet the defendant's requirement that applicants have three years of relevant experience after obtaining their professional degree. Id.

Rev. Franklin's evidence does not establish a prima facie case of disparate impact. First, she has not presented any evidence which indicates that the percentage of women among all qualified applicants is substantially higher than the percentage of women in the VA chaplaincy. Again, the VA concedes that women are under-represented in the chaplaincy. However, the magnitude of the imbalance is not shown in the record. A showing of disparate impact requires proof of a substantial imbalance. Rev. Franklin measures qualified women applicants as those who have been endorsed by a religious denomination, while the VA considers qualified applicants to be those who meet the criteria outlined above. Nothing in the record indicates what percentage of either of these groups is women. The only specific evidence in the record concerns the effect the defendant's practices had on Rev. Franklin. "A sample of one is too small to demonstrate significant impact." Drake, 927 F.2d at 1161.

Second, Rev. Franklin concedes that the pool of qualified women applicants as measured by the VA, that is women with three years of relevant experience after completion of their professional degree, was diminished by factors outside the control of the VA. Plaintiff's response to defendant's motion for summary judgment,

p. 4. Again, it was Rev. Franklin's religious denomination, not the VA, which did not permit women to study for ordination until recently. There is no evidence that Rev. Franklin's denomination's exclusion of women had any effect on anyone but Rev. Franklin. Further, even if it is assumed that the denomination's exclusion of women had affected a large number of women, and caused a disparity between the percentage of women in the chaplaincy and the percentage of women who otherwise would be qualified for the chaplaincy, this disparity was caused by the religious denomination's exclusion of women, not the VA's exclusion of women. In short, the facts in the record do not establish a causal connection between the defendant's requirement of three years of experience and a substantial adverse impact on women, African-Americans, or those over 40, the protected classes at issue here.

The defendant's motion for summary judgment should be granted as to Rev. Franklin's Title VII claims, and Rev. Franklin's motion for summary judgment should be denied. The undisputed facts in the record do not support her claim of discrimination on the basis of sex, age or race because Rev. Franklin has not presented sufficient evidence of discriminatory motive on the defendant's part, or of a disparate impact on any of these groups caused by the defendants' employment practices.

IV. CONSTITUTIONALITY OF DEFENDANT'S QUALICATION CRITERIA

For the reasons discussed above, I recommend that Rev. Franklin's Title VII and ADEA claims be dismissed. The grounds for dismissal outlined above are independent of any evaluation of the constitutional issues raised by Rev. Franklin. Should the Court conclude that there is some arguable basis for Rev. Franklin's Title VII and/or ADEA claims on the issues discussed above, then resolution of the constitutional issues raised by Rev. Franklin becomes necessary. Therefore, I briefly will address

those issues here. For the reasons discussed below, I conclude that the education and experience requirements imposed by the VA are constitutional. Rev. Franklin does not meet these requirements and thus is not qualified for a chaplain's position.

Rev. Franklin claims the defendant's requirements that a chaplain possess a master of divinity degree and three years of post-degree pastoral experience violate the Constitution. She says these requirements amount to a religious test as a qualification for public office, in violation of Article VI of the Constitution. She also argues that these requirements amount to a judgment by the government concerning the validity of certain religions, in violation of the Establishment Clause of the First Amendment. She says these judgments constitute an excessive entanglement of the government with religion.

In evaluating these claims, it should be noted that the parties do not dispute that the position of VA chaplain has both religious and secular aspects. See, e.g., Murphy v.Derwinski, 990 F.2d 540, 545-46 (10th Cir. 1993). A chaplain is required to address the religious need of patients whose religion often is different than that of the chaplain. Thus, a chaplain must have a broad understanding of various faiths, in addition to an understanding of his or her own faith. In addition, chaplains have other non-religious duties which also may require a certain level of education and experience. Id.

A. Article VI

Article VI of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.". In Torcaso V. Watkins, 367 U.S. 488 (1961), the Supreme Court noted that Article V1 was directed primarily at prohibiting religious test oaths. Id., p. 65. Here, Rev. Franklin broadly construes the term "religious test" to include the education and experience requirements imposed by

the VA. I conclude that these requirements cannot reasonably be construed as a religious test.

The VA's education and experience requirements do not require a particular type of faith or belief. Rather, these requirements mandate that a chaplain have a certain level of education and experience, attainable in many different ways, which will enable the chaplain to serve VA clients with a wide range of religious beliefs and secular needs. Although training in the area of religious faith generally is required, the VA does not mandate that a chaplain have a particular faith or type of faith. Rather, the VA requires that its chaplains have a broad understanding of, and experience with, religious faith so they may serve a broad range of faiths, and a broad range of other needs. The VA requirement that chaplains have education and experience which ensures that they have a broad understanding of religious faith generally, as well as the ability to perform a variety of secular duties, does not amount to a religious test, in violation of Article VI of the Constitution.

B. Establishment Clause

The First Amendment provides that "Congress shall make no law respecting an establishment of religion. . ." The Establishment Clause prohibits an excessive entanglement between government and religion. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Rev. Franklin argues that the VA's requirement that chaplains possess a certain level of relevant education and experience amounts to an excessive entanglement between government and religion because these requirements amount to a judgment by government of which religions are proper, and which are not. She does not argue that the VA chaplain program itself amounts to a government establishment of religion.

In Lemon the Supreme Court defined a three part test for Establishment Clause claims. The statute or regulation 1) must

have a secular, legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion, and; 3) it must not foster and excessive government entanglement with religion Id., at 612-13. Rev. Franklin appears to address her argument primarily to the third Lemon factor, but I will address all three.

First, the education and experience requirements have a secular purpose. The VA chaplaincy is designed, in part, to serve the religious needs of its clients. Serving these needs, in turn, promotes efficiency and morale in the armed services, and promotes the right of VA clients to freely exercise their religious beliefs. See, e.g., Katcoff v. Marsh, 755 F.2d 223, 233-36 (2nd Cir. 1985). Again, the chaplaincy also has secular purposes. In Katcoff, the Second Circuit found that furnishing chaplains to the armed services did not violate the establishment clause, although the Katcoff court did not apply the Lemon test. Id., at 235.

Requiring that chaplains have education and experience which enables them to serve the broad range of religious and secular needs presented by their clients also serves the purposes of promoting efficiency and morale, and of permitting VA clients to practice their religion. Like the chaplaincy program itself, these requirements have a secular purpose.

Second, the principal or primary effect of these requirements neither advances nor inhibits religion improperly. Of course, having chaplains at all could be said to advance religion. Chaplains make VA clients better able to practice their religion. On the other hand, if the VA had no chaplains, it easily could be said that it was inhibiting religion by making it difficult or impossible for its clients to practice their religions. Again, the chaplaincy program has been upheld as striking an appropriate balance between these two poles.

Chaplains from a wide variety of faiths are accepted by the VA.

The VA does not impose its own endorsement or ordination requirements, but accepts those of various faiths. See Murphy v. Derwinski, 776 F. Supp. 1466, 1471-72 (D. Colo. 199 1), aff'd, 990 F.2d 540 (10th Cir. 1993). In addition, the VA requires that chaplains have broad education and experience, because chaplains have a broad range of duties. The requirement that chaplains have some breadth of education and experience does not serve to advance religion any more than the chaplaincy program itself. Further, this requirement tends to ensure that chaplains can address faiths other than their own particular faith in the course of their work. This ensures that chaplains do not advance one religion at the expense of another. Third, and finally, the VA's education and experience requirements do not promote an excessive entanglement of government with religion.

The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other ... (Total separation is not possible in an absolute sense. Some relationship between government and religious organization is inevitable... [T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. Lemon, 403 U.S. at 614. Here, the education and experience requirements do not mandate or promote a particular religious belief over others. Rather, these requirements mandate that chaplains have a more broad view of religion, rather than a view focused on one faith. The requirements do not bestow a benefit on a particular religion, or on religion in general. See Murphy v. Derwinski., 776 F. Supp. at 1470-72. If the VA chaplain program itself does not constitute excessive entanglement, then the requirement that the chaplains have a broad religious outlook cannot be said to do so.

C. Conclusion

In sum, the education and experience requirements imposed by the VA do not violate either Article VI or the Establishment

Clause of the First Amendment. At the time of her application, Rev. Franklin did not meet either of these requirements. Therefore, she was not qualified for the position for which she applied and cannot establish a prima facie case of discrimination under Title VII or the ADEA.

THEREFORE IT IS RECOMMENDED that the defendant's motion for summary judgment be granted, and that Rev. Franklin's motion for summary judgment be dismissed.

DATED this day of April, 1997.

BY THE COURT:

/s/ O. Edward Schlatter
O. Edward Schlatter
United States Magistrate Judge

APPENDIX D

Equal Employment Opportunity Commission
City Crescent Building
Baltimore District Office
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201

BARBARA G. FRANKLIN, Complainant,	EEOC CASE NO.; 120-95-6499X
v.	
SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, Agency.	AGENCY CASE NO. 94-2204
	Date: 8/15/95

AGENCY'S PREHEARING STATEMENT

COMES NOW THE Agency, by its representatives, and in response to the NOTICE OF HEARING AND ORDER dated July 24, 1995, respectfully states as follows:

I. FACTUAL CONTENTIONS

A. Background Information

Barbara Franklin (hereinafter referred to as the "Complainant") applied for the position of Staff Chaplain, GS-060-11, VA Medical Center, Denver, Colorado (Announcement No. 94-30). The National VA Chaplain Center, Hampton,

Virginia, performed the examination and referral of qualified applicants for the Chaplain position.

A member of the Board of Excepted Service Examiners (Chaplain Michael McCoy), assisted by a Personnel Management Specialist (John Batten), reviewed the Complainant's application and determined that she was not qualified for the Chaplain position based on the following reasons: 1) she did not meet the minimum educational requirements; and 2) she did not meet the minimum pastoral experience requirements. By letter dated July 20, 1994, the Complainant was informed by the National VA Chaplain Center that she did not meet the VA qualification requirements for the Chaplain position (See EEO File Tab C-8).

By letter dated August 6, 1994, Complainant's Representative requested that Complainant's qualifications be reexamined (See EEO File Tab C-10). The Complainant's Representative also noted in his letter that the National VA Chaplain Center had made a reference to the Complainant's age on an internal memorandum. After learning of the inappropriate age reference, the agency verbally counseled the Program Assistant responsible for the reference and assigned her to a different immediate supervisor for closer supervision of her work.

In response to the Representative's request that the Complainant's qualifications be reexamined, the Agency had two members of the Board of Excepted Service Examiners (James E. Lauer, Chaplain Program Manager for Region 2 and Spiritual Development Director for the National VA Chaplain Center, Hampton, and Alton Keith Ethridge, Acting Manager, Chaplain Educational Center) conduct a second review of the Complainant's qualifications. The two members who performed the second review were not involved with the initial determination, and had no knowledge of the reference to the Complainant's age. After a careful review of the Complainant's qualifications, the second two member Board concurred that the

Complainant did not meet the minimum standards. By letter dated September 1, 1944, the Complainant was advised of the second review Board's findings (See EEO File Tab C-11). By separate letter dated September 1, 1994, the Complainant's Representative was advised of the findings (See EEO File Tab C-12).

Still unsatisfied with the review process, the Complainant pursued the present EEO Complaint. The Complainant alleged that the non-qualification decision was due to discrimination on the basis of race (black), age (62) and gender (female).

B. The Complainant Failed to Meet the Minimum Qualification Standards for a VA Chaplain GS-060-11

1. Complainant Did Not Meet the Education Requirements of the Chaplain Position

Under the EDUCATION AND EXPERIENCE REQUIREMENTS of the Qualification Standards (VA Manual MP-5, Part I Change 6, Appendix 338A, September 30, 1964) for a VA Chaplain, a qualified applicant must meet the following criteria:

> "2. They must possess the bachelor of arts and bachelor of divinity or bachelor of sacred theology degrees, as evidenced by a transcript of credits from an accredited college, university, or theological institution or their equivalent."
>
> "Equivalent educational qualifications will be construed to mean successful completion of the number of semester hours of college and graduate study required for the above degrees. Approximately 210 semester hours of study are required for the above degrees. Approximately 210

semester hours of study are required for such degrees."

See EEO File Tab C-la.

It should be noted that during the 1970's the terminology "bachelor of divinity" was changed to "master of divinity" (See Agency Exhibit "A" confirming the change in terminology). Presently, therefore, the qualified applicant must possess a bachelor of arts and master of divinity or bachelor of sacred theology degree.

The Complainant received a BA degree in 1973 from Pacific Lutheran University, Tacoma, WA (majoring in social welfare); a MA degree in 1976 from Pacific Lutheran University, Tacoma, WA (majoring in human relations); and a Ph.D. in 1993 from LaSalle University, Mandeville, LA (See EEO File Tabs C-4; C-5; C-6a; C-6b). LaSalle University is not accredited by any agency recognized by the U.S. Secretary of Education. (See EEO File Tab C-17); Also Agency Exhibit "B" for a listing of 1994-95 Accrediting Bodies of Postsecondary Education).

The Complainant failed to meet this primary educational component of the VA Chaplain position because she did not possess a master of divinity or bachelor of sacred theology degree, or its equivalent. Her course work at Pacific Lutheran and LaSalle University beared little resemblance to a master of divinity curriculum (See EEO File Tab C8 for a copy of VA educational equivalent requirements; Also See Attached hereto as Agency Exhibit "C" a copy of the General Policies and Instructions for interpreting minimum education requirements). As noted above, her major field of study in obtaining a MA degree from Pacific Lutheran was human relations. Although the Complainant received a Ph.D. in Theocentric Counseling from LaSalle University, this institution is not accredited from a nationally recognized accrediting agency nor was the

Complainant's curriculum "equivalent" to that of a master of divinity (See EEO File Tab C-7 for a copy of LaSalle's degree requirements).

The Complainant has never alleged that her MA degree from Pacific Lutheran should be considered equivalent to a master of divinity. The Complainant's only evidence that the LaSalle degree should be accepted as equivalent consists of two letters, one from Colorado Christian University, and the other from Iliff School of Theology (See EEO File Tab C-13a and C-13b). Colorado Christian University stated that it would accept three courses that the Complainant took at LaSalle toward a degree; Iliff School of Theology agreed to transfer two courses from LaSalle's curriculum. The Complainant's evidence that two institutions would accept a couple of courses toward a degree falls far short of establishing an "equivalent" curriculum. Moreover, this evidence simply pales in comparison to the established VA educational equivalent requirements and the VA's efforts on two separate occasions to review the Complainant's credentials.

2. Complainant Did Not Meet the Experience Requirements of the Chaplain Position

Under the EDUCATION AND EXPERIENCE REQUIREMENTS of the VA Qualification Standard (VA Manual MP-5, Part I, Change 6, Appendix 338A, September 30, 1964), for the Chaplain position, a qualified applicant must meet the following criteria:

> "Additional Experience Requirements.
> In addition to meeting the above basic requirements, applicants must show the following types of experience in the amounts shown under the appropriate grades.

> GS-11: At least 3 years' experience in which the principal duty was as a clergyman after completion of professional preparation and which demonstrated a background of practical pastoral knowledge and skill."
>
> (See EEO File Tab C-1A)

Whether or not the Complainant met the "experience" element of the Chaplain position is purely academic, because she did not even meet the initial educational requirements of the job as described above. However, even if the Complainant met the education requirements (which she did not), the Complainant would not have been found qualified for the job, because she lacked the required experience component.

The Complainant's post-graduate degree from LaSalle University was obtained in July 1993. The Complainant was determined to be unqualified for the VA Chaplain position in July 1994. The Complainant, therefore, had only graduated from LaSalle University the year preceding her application for the VA Chaplain position. Thus, the Complainant's experience fell some two years short of meeting the minimum three years of post-graduate pastoral experience requirement of the job.

Moreover, the Complainant's experience was in no way close to qualifying as "equivalent" to the established VA Manual requirements. A quick overview of the Complainant's employment application discloses that she has little, if any, professional pastoral experience (See EEO File Tab C-1B). It appears that her only work in this field has been on a voluntary basis, and that she has never been employed as a pastor or even as an associate. Although the Complainant emphasizes that she volunteered at the Denver VA Medical Center, the VA Medical Center's records reflect that from the period of May 1994 (which is the earliest record of her volunteer work) until September 1994

(which is the last record of her volunteer work, and some two months after the closing date of the position announcement) the Complainant only worked approximately 194 hours performing voluntary work for the VA (that amounts to an average of 9 hours per week). These records also reflect that she volunteered for the Denver VA Medical Center only two months before the closing date of the position announcement. Obviously, assisting a pastor or chaplain on a part-time, voluntary basis is far different from having three years post-graduate experience in which one's principal duty is that of a clergyperson.

The Complainant's employment background consisted of: teaching a Basic Supply course for the U.S. Air Force (40 hours a week from 5/86 to present); working as a Prosthetic Technician for the VA (40 hours a week from 11/81-4/86); and other full-time, and strictly non-pastoral work before that. In light of her full-time employment outside the pastoral field and of her mere part-time, voluntary contributions assisting chaplains and pastors, it is impossible to conceive how the Agency could have possibly found that she met the experience criteria of the job.

C. The Complainant was Not the Better Qualified Candidate for the Position

Even if the Agency determined that the Complainant was minimally qualified for the job, the Complainant was not the better qualified candidate. Therefore, the Complainant has not suffered any employment harm, because she will not be able to establish that she was better qualified than the individual selected.

A review of the application of the individual selected for the position established that he was more qualified for the Chaplain position than the Complainant (See EEO File Tab C-15). The selected individual is a 5-point preference veteran (the Complainant has no preference status). The individual selected is 55 years old (date of birth: 12/11/40). The selected individual

obtained a BA degree from Pacific Union College, Angwin, Ca, in 1963 (majoring in religion); a master of divinity degree from Andrews University, in Berrien Springs, Mi, in 1968; and a MA degree from Chapman University, in Orange, CA in 1987 (in Counseling Psychology). Moreover, the selected candidate had seven years experience as a civilian parish pastor, eighteen years experience as a military chaplain, and a plethora of related experience in the area of: clinical and personnel counseling; management; and teaching and training (See EEO File Tab C-15).

In light of the credentials of the candidate selected, the Complainant will not be able to establish that she was the better qualified applicant. Thus, even if the Complainant prevailed on her bald assertion that she was found non-qualified because of discriminatory impact and/or treatment, she will not be able to establish any employment harm.

D. Summary of Factual Contentions

The VA Chaplain position is a professional one--one which necessitates a certain level of education and experience. These requirements provide the VA with an objective means of ensuring basic minimum qualification standards. Indeed, the VA Chaplains have a uniquely difficult task of providing for the spiritual needs of our veterans. The education/experience components provide an objective mechanism to ensure highly qualified VA Chaplains, and to justify their GS-11 starting grade.

It should be noted that the VA does not require ordination as a qualification of the job; simply an ecclesiastical endorsement along with the education/experience requirements. In fact, the Complainant has an ecclesiastical endorsement from the Full Gospel Churches (which she obtained through the assistance of the VA). The mere fact that an individual is able to obtain a church endorsement, however, provides little comfort that such endorsement was based on legitimately high standards. The VA

has no way of knowing on which criteria the denominations reply in making endorsement decisions. The education/experience component of the VA Chaplain job provides for some degree of uniform qualification standards. Since ordination is not a requirement of the job, and since the Complainant has an endorsement, any allegation of discrimination based on endorsement and/or ordination requirements is irrelevant to the present matter.

The Agency did not qualify the Complainant for the position of VA Chaplain because she did not meet the minimum criteria for the position. She failed to meet the minimum criteria for two reasons: 1) she lacked the requisite education requirement; and 2) she lacked the requisite experience requirement. Even if the Complainant established that she should have been referred for consideration, the Complainant's case will fail; because she will not be able to show that she was the better qualified candidate for the job.

II WITNESSES

1) John Batten, Personnel Management Specialist--Mr. Batten will testify regarding the initial review of the Complainant's application, as well as the written and verbal communications that he had with the Complainant. Mr. Batten will also testify concerning the qualification standards required of the Chaplain position at issue.

2) C. Ronald Phelps, Deputy Director, Chaplain Services for the Department of Veterans Affairs. Chaplain Phelps will testify regarding the VA's hiring policies. He will also testify regarding the efforts made to assist the Complainant in the application process. Moreover, Chaplain Phelps will explain what actions were taken by the VA to correct the notation regarding the Complainant's age. Additionally, he will compare the

responsibilities of a voluntary clergyperson versus those of a VA Chaplain.

3) Michael L. McCoy, Regional Chaplain Manager. Chaplain McCoy will discuss the criteria he considered when he conducted the initial review of the Complainant's application. He will also explain the basis of determining that the Complainant failed to meet the qualification standards for the job. Additionally, he will testify concerning efforts made to hire qualified women and minority applicants.

4) Mary Jane Johnston, Program Assistant. Ms. Johnston will testify regarding the note she made concerning the Complainant's age.

5) James E. Lauer, Chaplain Regional Manager for Region 2 and Spiritual Development Director for the National Chaplain Center, Hampton, Virginia. Chaplain Lauer will discuss the criteria he considered when he conducted the second review of the Complainant's application. He will also explain the basis for determining that the Complainant failed to meet the qualification standards for the job.

6) Alton Keith Ethridge, Acting Chaplain Manager for the Chaplain Education Training Center. Chaplain Ethridge will discuss the criteria he considered when he conducted the second review of the Complainant's application. He will also explain the basis for determining that the Complainant failed to meet the qualification standards for the job.

7) Dr. Daniel Adams, Acting Chief Chaplain, Denver, Colorado VA Medical Center. Dr. Adams will testify regarding the Complainant's voluntary work at the Denver VA Medical Center.

8) Ray Thomas, Former Chief Chaplain, Denver, Colorado VA

Medical Center. Chaplain Thomas will testify concerning the Complainant's voluntary work at the Denver VA Medical Center.

9) Ada L. Medina-Neale, Former Assistant Director, Denver Colorado VA Medical Center. Ms. Medina-Neale will testify concerning the utilization of volunteers at the Medical Center.

III. LEGAL ARGUMENT

A. The Complainant has Failed to Present a Prima Facie Case of Discrimination

In her Prehearing Submission, the Complainant appeared to allege both Disparate Treatment and Impact theories of discrimination. In order to establish a prima facie case of Disparate Treatment in a nonselection case, a Complainant has the burden of establishing that she is a member of a protected class, that she applied and was qualified for the position, and that someone outside her protected group was selected for the position. Weinstein v. U.S. Postal Service, 01830674, 1056/F14 (1983). In accordance with McDonnell Douglas v. Green, 411 U.S. 792 (1973), a prima facie case of discrimination in selections or promotions consists of those facts which, if otherwise unexplained, would lead one reasonably to conclude the action was based on discriminatory motives.

As discussed above, the Complainant has not established a prima facie case of Disparate Treatment, because she was not "qualified" for the VA Chaplain position; she filled to meet both the minimum education (BA and master of divinity or bachelor of sacred theology degree from an accredited institution) and the experience requisites of the job (three years post-graduate experience in which the principal duty was as a clergyperson).

Specifically, the Complainant received her post-graduate degree from an institution that is not accredited from any

nationally recognized accrediting agency. She received this degree only the year preceding her application for the VA Chaplain position. In her own application, moreover, she explains that she taught a Basic Supply course for the U.S. Army on a full time basis (40 hours per week) for the eight year period preceding her application. Furthermore, in her own application, she disclosed that before teaching the Supply course, she held other full time, and strictly non-pastoral jobs. Nowhere in her application did she contend that her pastoral experience was anything other than a voluntary, part-time endeavor.

Moreover, the only specific allegation of Disparate Treatment that the Complainant has ever argued concerned the notation about her age. In response to this allegation, the Agency admitted that the notation was inappropriate; the Agency reconsidered the Complainant's application (it was reevaluated by two individuals without any knowledge of the notation); and the Agency took steps to assure that the isolated event would not be repeated (the employee responsible for the notation was given a counseling and a new immediate supervisor). Thus, the issue concerning the Complainant's age is moot; it was an isolated mistake with no reasonable expectation that it will reoccur, and there was no employment harm to the Complainant since her application was re-evaluated.

2. Complainant was not the "better" Candidate

Even if the Complainant established a prima facie case of Disparate Treatment (which she has not), the Complainant would not prevail in this matter, because she cannot show that she was the "better" candidate. When the Agency asserts that it selected the best qualified candidate for a position, the qualification of the candidates are at issue and should be reviewed. However, it is not the function of the Commission to substitute its judgment for that of the selecting official familiar with the present and future needs of his facility and therefore in a better position to judge the

respective merits of each candidate..." Bowser v. U.S. Postal Service, 01830780, 1060/D2 (1983). Also see Jackson v. Department of Navy, 01831311, 1070/G7 (1983).

As explained above, the applicant selected for the Chaplain position was the better qualified candidate. The selected individual's credentials are evidenced in his job application located at EEO File Tab C-15. Thus, the Complainant suffered no employment harm, because even if she established a prima facie case, she cannot show that she was the better qualified candidate. It is well established that the desire to hire the more experienced and better qualified applicant is a nondiscriminatory, legitimate and common reason on which to base a hiring decision. See Holder v Old Ben Coal Co., 618 F.2d 1198 (7th Circ. 1980).

3. Disparate Impact

To establish a prima facie case of Disparate Impact, the Complainant must show that she is a member of a protected group and that she has been subjected to a neutral employment criteria or policy which disproportionately or adversely affects the protected class. Mulrooney v. General Service Administration, 01842063, 1450/A3 (1986).

Pursuant to the Civil Rights Act of 1991, 42 U.S.C. Section 2000e-2(k)(1)(A), "an unlawful employment practice based on disparate impact is established under this subchapter only if - (I) a complaining party demonstrated that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party made the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice."

Thus, the theory of Disparate Impact involves a showing that the facially neutral hiring or promotional practices of an agency have a disproportionate impact on a protected group. The Complainant must show more than "isolated, accidental or sporadic discriminatory acts." Komp v. Department of Housing and Urban Development 01831271, 1070/B10 (1983). Complainant's need to demonstrate, by a preponderance of the evidence, that prohibited discrimination was "the (agency's) standard operating procedure - the regular rather than the unusual practice" International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

In her Prehearing Submission, the Complainant relies heavily on the holding in Murphy v. Derwinski, 990 F.2d 540 (10th Cir. 1993). This case is easily distinguishable from the present matter, and therefore, the Complainant's dependence on its holding is misplaced. In Murphy an application for a Roman Catholic VA chaplaincy position was rejected because, at that time, "ordination" was a job requirement. The Roman Catholic Church does not ordain women, and therefore, the plaintiff could not qualify for the VA position, requiring ordination. The plaintiff met the education and experience components of the job. Thus, the only issue before the Tenth Circuit concerned the ordination requirement.

During the Murphy trial, testimony and other evidence (including concerns over the ordination requirement expressed by the VA's own General Counsel Office) disclosed that the employer's legitimate hiring interests could be met by simply requiring ecclesiastical endorsement, and not ordination. See Murphy at 544 (noting that plaintiffs must persuade the factfinder that alternative practices would be equally effective in achieving the employer's legitimate employment goals). In determining that ecclesiastical endorsement requirements served the same needs as ordination criteria, the Tenth Circuit held that the ordination requirement should be removed (It should be noted that the Tenth

Circuit left the door open for a future challenge to the endorsement requirement. See. Murphy at 544). The Murphy Court concluded that "with the ordination requirement gone, the VA's own policies will not prevent women from competing for Catholic chaplain positions" Murphy at 547.

The Murphy case exclusively dealt with the prior ordination requirement; the Court, in fact, did not even entertain the endorsement component of the job. The Court, moreover, did not express any concern whatsoever with the education/experience requirements. The case turned, exclusively, on the fact that the ordination requirement, as a matter of law, totally precluded Catholic women from serving as VA Chaplains. There is simply no parallel argument that education/experience criteria preclude any protected group of individuals from qualifying for the VA Chaplain positions. The Complainant's argument, in the present matter, that the Murphy holding mandates that the VA must blindly reply on any church endorsement (whether the church happens to be a nationally renowned institution or some fly-by-night organization) stretches the Tenth Circuit holding to a point that was never intended, as evidenced by the plain language of the ruling.

In the present matter, the Agency concedes that it would like to have a better representation of protected groups as VA Chaplains. In considering the statistical data regarding VA Chaplain positions, however, it is imperative to look at the pool of applicants from which the VA Chaplains are selected. It is well settled that in establishing proof of discrimination from statistical evidence, the required comparison is to a qualified pool of applicants. See Pouncy v. Prudential Insurance Co., 668 F.2d 795, 803 (5th Cir. 1982); Also See Coppea v. Defense Mapping Agency, 01842674, 1463/G5 (1986). Presently, the Agency is in the process of compiling statistical data concerning the pool of applicants for the VA Chaplain positions. This data, in turn, will be submitted to establish that the Complainant has not set forth

facts/statistics which set forth a prima facie case based on Disparate Impact.

The Complainant, in this case, has failed to show a particular employment practice that causes a Disparate Impact to a protected group of individuals. The Agency's educateion/ experience requirements are legitimate and objective means of ensuring basic level of professional expertise. The education/experience criteria does not adversely impact any protected group. Unlike the fact pattern in the Murphy case where the ordination precluded Catholic women from becoming VA Chaplains, the education/experience component of the job has no such effect on protected groups. Moreover, upon review of statistics relating to the pool of applicants, it will become evident that the Agency's selections did not disproportionately favor one group of individuals over others. As a note, the Agency submits that the Complainant may not allege an age-based Disparate Impact claim. See 42 U.S.C. Section 2000e2(k)(1)(A)(i). Also See Hiatt v. Union Pacific R.Co., 859 F.Supp. 1460 (D.Wyo. 1994).

B. The Complainant's Complaint Should Be Dismissed

In order to pursue an EEO complaint, the employee must have standing; that is, the employee must frame his allegations in such a way as to "sufficiently claim personal injury as a result of the discriminatory practices." Edwards v. U.S. Postal Service, 01830784, 1060/E3 (1983). The Commission, in its regulations, requires that the Complainant be "aggrieved." See 29 CFR 1614.103 and 1614.106(a). Under 29 CFR 1614.107(a), an Agency may dismiss any complaint that fails to state a claim under subsections 1614.1`03 and 1614.106(a).

The present matter should be dismissed because the Complaintant has not set forth facts establishing a prima fcie case

based on Disparate Treatment or Impact. The VA Chaplain is not simply a clergyperson but an employee hired to perform duties for which she has, by dint of her religious education and pastoral experience, a special aptitude. The basic requirements of the job are set forth at VA Manual MP-5, Part I Change 6, Appendix 338A (September 30, 1994) (See EEO File Tab C-la). The Complainant's application was reviewed on two separate occasions, and by two separate reviewing groups. Both times, the reviewers determined that the Complainant failed to meet two necessary components of the job criteria, namely: 1) education; and 2) experience. The education/experience requirements are legitimate business criteria ensuring qualified VA Chaplains, and justifying their GS-11 starting grade. This criteria, moreover, does not adversely effect any protected group. Accordingly, the Complainant has failed, as a matter of law, to establish a prima facie case of discrimination.

In the alternative, the Disparate Treatment portion of the case should be dismissed because the Complainant has not set forth any facts establishing that she was the better qualified candidate. After comparing the applications of the Complainant and the selected individual, it is readily apparent that the Complainant was not the better qualified of the two. Consequently, the Complainant has failed, as a matter of law, to establish that she is an "aggrieved" party.

What we have here is a case of disappointment, not discrimination. The Complainant has worked hard to obtain her educational degrees, and she very obviously has volunteered long hours in the service of her faith. The Agency has genuinely appreciated her volunteer work with our veterans, and would be happy to consider her for a further VA Chaplain position once she meets the qualification standards. None of this is in dispute--none is denied by the Agency. However, in discrimination cases, it is the Complainant's burden to set forth a prima facie case. In light of the undisputed facts of this case, it is the Agency's

position that the Complainant has fallen short of meeting this burden. The Complainant's Complaint, therefore, should be dismissed without a hearing.

Respectfully submitted,
DEPARTMENT OF VETERANS AFFAIRS,

By /s/ Kathleen Keith Oddo
Agency Representative
Kathleen Keith Oddo, Esq.
Office of District Counsel (02)
VA Regional Office
210 Franklin Rd., S.W.
Roanoke, Va. 24011

telephone (504) 857-2163
fax: (540) 857-2309

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-S-1031

BARBARA G. FRANKLIN,

Plaintiff,

v.

JESSE BROWN, Secretary, Department of Veterans Affairs,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant respectfully submits the following brief in support of his motion for summary judgment. Defendant firmly believes that there are several legal bases on which this Court should grant judgment in defendant's favor, and that as to each of these there are no controverted issues of material fact necessitating a trial of the facts. This is a lawsuit that never should have been filed, and the following brief establishes beyond doubt that plaintiff has no legal basis for recovery.

I. INTRODUCTION

Plaintiff, Barbara L. Franklin, brings this action pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C.§§ 621-631, alleging she suffered age discrimination when not hired as a chaplain with the Department of Veterans Affairs Medical Center (DVAMC) in Denver, Colorado. The Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1291. Plaintiff also alleges race and sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

In 1994, plaintiff applied for a chaplain position with the DVAMC. At that time, all such applications were processed through the National VA Chaplain Center in Hampton, Virginia. The Chaplain Center determined that plaintiff was not qualified for the position. Therefore, her name was not on the list of qualified applicants which was forwarded to the DVAMC. Plaintiff alleged discrimination and was denied relief at the administrative level. This action followed.

In this motion, defendant moves for summary judgment on the ground that plaintiff was not qualified for the position. Therefore, she cannot establish a prima facie case of discrimination.

II. UNCONTROVERTED MATERIAL FACTS

1. Plaintiff is an African-American female. Complaint at ¶ 5. She was born on November 30, 1932. Exhibit I hereto (SF-171).

2. Plaintiff received a Ph.D. in Theocentric Counseling from LaSalle University (headquartered in Louisiana) on July 6, 1993. Id.; Exhibit 2 (transcript from LaSalle University).

3. Plaintiff worked as a volunteer with the DVAMC

chaplains for approximately one year, beginning in November 1993. Exhibit 3 at 33-39 (excerpts from plaintiff's deposition).

4. Less than one year after receiving her Ph.D., on May 10, 1994, plaintiff applied for a position as chaplain with the VA. Exhibit 4.

5. In 1994, the National Chaplain Center in Hampton, Virginia performed the duties of assembling applications for chaplain positions, checking qualifications, and compiling a list of qualified applicants, which the Chaplain Center then sent to the hiring officials in the field. The persons who reviewed the applications sat on the Board of Excepted Service Examiners (BESE). Exhibit 5 (describing VA policy on staffing chaplain positions and BESE responsibility). Plaintiff's application was reviewed by Chaplain Michael McCoy and Chaplain William Kinniard. Affidavit of Michael McCoy, Exhibit 6 a 3; Affidavit of William Kinniard, Exhibit 7 ¶ 2.

6. The BESE screened all applications for chaplain positions, which included determining whether an applicant met the qualifications for a VA chaplain and ensuring that all required paperwork had been completed and submitted. McCoy Aff. at ¶ 2. The BESE also rated applicants and created the final list which was sent out to the field where the vacancy was. Id. The field office (typically a VA hospital) then made the selection from that list. Id. Chaplain McCoy was the principal recruiter for minorities (including women) for the National VA Chaplain Service.

7. In reviewing Ms. Franklin's application and documentation, Chaplains McCoy and Kinniard determined that she did not have a Master of Divinity Degree , nor did she have the course work which might have been the equivalent of a Masters of Divinity degree, id., at ¶ 5, which is required for the

position. Exhibit 8 (Qualification Standard for chaplain).[1] They studied her transcripts in detail, looking for courses in pastoral care, biblical studies, church history and the like. Id. These are the types of courses which normally comprise the Master of Divinity study. Id. Ms. Franklin's course work fell far short of the requirements for a Masters of Divinity Degree. Id.; Exhibit 10 (statement on what constitutes the equivalent of a Masters of Divinity).

8. Chaplains McCoy and Kinniard also determined that LaSalle University, from which plaintiff received her professional degree, was not accredited as required by VA personnel regulations. Id. at ¶ 6; Exhibit 11 (accreditation requirement).

9. Furthermore, Chaplains McCoy and Kinniard determined that plaintiff did not have the required three years of pastoral experience beyond her professional degree. Id. at ¶ 7; Exhibit 8 (experience requirement for a GS-11). As noted above, plaintiff received her professional degree in July 1993, about ten months before her application for a chaplain position.

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1 The actual Qualification Standard states that a Bachelors of Divinity is required. In the early 1970's the Association of Theological Schools changed its terminology for the three-year graduate degree in Divinity from "Bachelor of Divinity" to "Master of Divinity." This was merely a change in nomenclature. The requirements for the degree did not change. The VA Qualification Standard for the position here at issue, dated September 30, 1964, states that a "Bachelor of Divinity or Bachelor of Sacred Theology" degree is required. At the time of Ms. Franklin's application this nomenclature was no longer in use, and no graduate educational institutions were offering such a degree. Affidavit of John Batten, Exhibit 9, at ¶6 & attachment thereto.

10. A waiver of the professional experience requirement may rarely be given if an applicant has significant Clinical Pastoral Education experience, which is the equivalent of an internship program following the receipt of a professional degree. McCoy Aff. at ¶ 9.

11. Chaplains McCoy and Kinniard looked very carefully at plaintiff's experience, and it did not even approach what would have been required for such a waiver. Id. Although during her lifetime plaintiff had layperson experience in her church, these were not a sufficient substitute for the post-professional degree pastoral experience requirement.

12. Chaplain McCoy, who is African-American, viewed Ms. Franklin as a highly desirable candidate for a chaplain position, especially considering the under representation of women in the VA chaplaincy and the need for chaplains in the women's program of the VA. McCoy Aff. At ¶ 9.

13. Neither Chaplain McCoy nor Chaplain Kinniard relied on plaintiff's race, sex or age in their decision on her qualifications. Id. at ¶ 10; Kinniard Aff. at ¶ 3, Exhibit 7.

14. After this review by the BESE, on July 20, 1994, she was informed by VA Personnel Management Specialist John Batten that she did not meet the qualifications for the position. Exhibit 12. Her application was returned to her. Id.

15. Stuck among the pages of her returned employment application was a note written by Mary Johnston, Program Assistant for Personnel for the Chaplain Center. On the note, among other things were the following words:

> Barbara Franklin
> (62-year-old) - Denver

Exhibit 13. Ms. Johnston had no responsibility for the selection of chaplains. Affidavit of Mary Johnston, Exhibit 14 at ¶5.

16. On August 6, 1994, plaintiff's attorney, Daniel Lynch, sent a letter to Mr. Batten complaining of the notation of plaintiff's age. Exhibit 15.

17. On August 10, 1994, in direct response to attorney Lynch's letter, the Deputy Director of the Chaplain Center, Ronald Phelps, implemented the following corrective measures concerning the reference to plaintiff's age:

a. Plaintiff would re-submit her application, and it would be reviewed by an entirely new Set of Board of Excepted Service Examiners; and

b. An investigation would be conducted into the origin of the note.

Exhibit 16. The investigation resulted in a counseling given to Ms. Johnston. Affidavit of Ronald Phelps, Exhibit 17 at ¶ 6. However, Deputy Director Phelps determined that Ms. Johnston had not intended to discriminate against plaintiff. Id.

18. Ms. Johnston's explanation for the note is set forth in her affidavit attached hereto as Exhibit 14. She did not intend to discriminate on the basis of age. Exhibit 14 at ¶5.

19. Plaintiff re-submitted her application for the chaplain position on August 8, 1994. Exhibit I (SF-171 dated August 8, 1994).

20. A second BESE met to review her application. This BESE was comprised of two chaplains who had nothing to do with the original application. Phelps Aff., Exhibit 17 at ¶5.

21. The persons on the second BESE, Chaplains Ethridge and Lauer, came to the same conclusions as to plaintiff's lack of qualification after conducting an even deeper investigation of her background in a conscious effort to try to qualify her. See generally Affidavit of Keith Ethridge, Exhibit 18 hereto; Affidavit of James Lauer, Exhibit 19 hereto.

22. On September 1, 1994, plaintiff was again informed that she did not meet the qualifications for the chaplain position. Exhibit 20. The VA also provided a detailed response to plaintiff's counsel's letter of August 6, 1994. Exhibit 21.

23. None of the persons involved in making the determination that plaintiff did not meet the qualifications for the position based their decision on plaintiff's age, sex, or race. Phelps Aff. at 8; McCoy Aff. at ¶ 10; Kinniard Aff. at ¶3; Johnston Aff. at ¶ 5; Batten Aff. at ¶12; Ethridge Aff. at ¶ 10; Lauer Aff. at ¶3.

III. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

This Court is well familiar with the standards for summary judgment under Fed. R. Civ. P. 56(c): "[T]he pleadings, deposition, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id.; *Celotex Corp. V. Catrett*, 477 U.S. 317, 322-23 (1986). A principal purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." Id. The court's inquiry is to determine "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 250 (1986).

The moving party bears the initial burden of showing, through evidence admissible at trial, an absence of a genuine issue of material fact given the relevant substantive law. Id. At 252. When the moving party has carried its burden under Fed. R. Civ. P. 56(c), the nonmoving party may not rest upon mere assertions or conclusory allegations. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party is required under Rule 56(c) to go beyond the pleadings, and present evidence that creates a genuine issue of material fact as to the elements essential to the nonmoving party's case. *Celotex* 477 U.S. at 324. "By its very terms, the standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original). "Material facts" are only those facts that might affect the outcome of the action under substantive law; factual disputes that are irrelevant or unnecessary are not counted. Id. At 248.

As shown below, there are no genuine issues of material facts as to all of plaintiff's claims, and defendant is entitled to summary judgment as a matter of law.

C. ELEMENTS OF PLAINTIFF'S CLAIMS

The Age Discrimination in Employment Act of 1967 makes it an unlawful employment practice for an employer to fail or refuse to hire any individual because of the individual's age. 29 U.S.C. ¶ 621 et seq. Likewise, Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to fail or refuse to hire any individual because of such individual's race, color, religion, sex, or national origin. *Equal Employment Opportunity Commission v. Wiltel, Inc.*, 81 F.3d

1508 (10th Cir. 1996). The factual inquiry in either case "'is [whether] the defendant intentionally discriminated against the plaintiff.'" *Wiltel*, 81 F.3d at 1513 (quoting *United States Postal Service v. Aikens*, 460 U.S. 711, 715 1983). A plaintiff proceeding under the ADEA must establish that age was "a determining factor" in the employer's challenged decision. *Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995).

The plaintiff may try to meet this burden through either direct or circumstantial evidence. Id. At 630. This Court is also well familiar with the differentiation between direct evidence of discriminatory intent and circumstantial evidence that discrimination may have been part of an employment decision. See *Wiltel*, 81 F.3d at 1514; *Ramsey v. City & County*, 907 F.2d 1004, 1007-09 (10th Cir. 1990), cert. denied, 506 U.S. 907 (1992).

If plaintiff does not have direct evidence of discrimination, she must establish a prima facie case by meeting certain elements set forth by the Supreme Court. This framework, first established in *McDonnell-Douglas v, . Green*, 411 U.S. 792 (1973), provides "a basic 'order of presentation of proof' so that the controversy can be increasingly brought into focus." *Equal Employment Opportunity Comm'n v. Flasher Co.*, 986 F.2d 1312, 1320-21 (10th Cir. 1992). Once plaintiff has made a prima facie case, the burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for the alleged discrimination. If the defendant meets this burden, the plaintiff must prove "the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff." *Sorenson v. City of Aurora*, 984 F.2d 349, 353 (10th Cir. 1993).

1. Plaintiff Cannot Establish a Prima Facie Case

Under the ADEA, to have a prima facie case the plaintiff must show: (1) she was within a protected age group; (2) she

applied for and was qualified for an available position; (3) she was adversely affected by the employer's decision; and (4) that a younger person was hired. *Jones*, 54 F.3d at 630. The *McDonnell Douglas prima facie* case of sex and race discrimination requires that plaintiff prove (1) membership in the protected class; (2) she was qualified for the position at issue; (3) the defendant made an averse employment decision despite plaintiff's qualifications; and (4) the person hired was not a member of the protected class. *Portis v. First National Bank of New Albany*, 34 F.3d 325, 328 n.6 (5th Cir. 1994); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 580 (6th Cir. 1992); *Lawson v. Getty Terminals Corp.*, 866 F. Supp. 793, 800 (S.D.N.Y. 1994). Both tests require that plaintiff be qualified. Therefore, plaintiff cannot establish a prima facie case of discrimination.

2. Defendant Has Offered a Legitimate, nondiscriminatory Reason

The attached affidavits and personnel materials clearly explain how plaintiff was not qualified for the position. Good faith application of a federal agency's personnel regulations is the quintessential legitimate, nondiscriminatory reason for any adverse employment decision.

3. Plaintiff Has No Other Argument to Get Beyond Summary Judgment

In this case, plaintiff has raised the following: (1) The note concerning plaintiff's age is evidence of discrimination; (2) defendant's policies result in a disparate impact on persons of plaintiff's age, sex and race, Complaint ¶10.1; and (3) defendant's hiring standards are unconstitutional, Complaint ¶10.2.

a. The "Age" Note

The note concerning plaintiff's age is not direct evidence

of discrimination because (1) it was made by a person who had nothing to do with the adverse employment decision; (2) even if (1) were not true, it is insufficient circumstantial evidence, as a matter of law, to allow plaintiff to go forward. Furthermore, proper remedial steps were taken after the remark was discovered by defendant. Established Supreme Court precedent states that in such a circumstance, there should be no liability. Finally, even if plaintiff could establish a prima facie case of age discrimination (or race or sex, for that matter), defendant has proffered a legitimate, nondiscriminatory reason for the adverse decision.

First, Ms. Johnston did not play any substantive role in the challenged personnel action here. Thus, any alleged discriminatory statement allegedly made by her cannot support a finding of discrimination. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (statements allegedly made by nondecision makers or statements by decision makers unrelated to the decisional process do not satisfy the plaintiff's burden of showing discriminatory animus); *Trotter v. Board of Trustees*, 91 F.3d 1449, 1453-54 (11th Cir. 1996) ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision."); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (holding that isolated or stray comments, unrelated to the challenged personnel action, are insufficient to show discriminatory animus; the plaintiff must demonstrate that a nexus exists between the allegedly discriminatory statements and the employment actions); *Snoey v. Advanced Forming Technology, Inc.*, 844 F. Supp. 1394, 1397 (D. Colo. 1994) (same); see also *Emmel v. Coca-Cola Bottling Co.*, 95 F. 3d 627 (7th Cir. 1996) (quoting and reiterating *Price Waterhouse); Carpenter v. Western Credit Union*, 62 F.3d 143, 145 (6th Cir. 1995) (reiterating that "isolated and ambiguous statements are too abstract, in additional to being irrelevant and prejudicial to support a finding of age discrimination"); *Henson v. Liggett Group, Inc.*, 61 F.3d 270,

276 (4th Cir. 1995) (recognizing that statements are only probative when they directly relate to a particular person, employment decision, or pattern of decision making); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 512 (8th Cir. 1995) (statement made by employee not involved in the decision to relocate not sufficient to show discriminatory animus); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (stating that stray remarks or isolated comments unsupported by other evidence of discriminatory motivation will not create a triable issue

Second, "Statements which are merely expressions of personal opinion or bias do not constitute direct evidence of discrimination." *Wiltel, Inc.*, 81 F.3d at 1514; Heim v. State of Utah, 8 F. 3d 1541, 1546-47 (10th Cir. 1993) (manager's remark that "I hate having fucking women in the office" *Ramsey*, 907 F.2d at 1008 (director's "feelings about women being better suited to some jobs than others" was not direct evidence of discriminatory intent); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1547 (10th Cir. 1987), reh'g denied, 842 F.2d 253 (10th Cir. 1988) (managers' statements that a plaintiff could not be promoted because he was "too damned old," and that other plaintiffs were too old to learn new technologies necessary to promotion and too old to be in supervisory or management positions was not direct evidence of discriminatory intent).

Third, conduct is not actionable discrimination when an employer, who is informed about alleged discriminatory conduct, takes adequate steps to deal with the problem. In *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995), the court addressed this issue under the guise of sex discrimination:

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court rejected a theory of strict liability for employers and instead looked to traditional agency principles to determine when they must pay for the sexual harassment of

employees by other employees. Id. At 69-73. Expanding upon *Meritor*, this court held that "[t]he employer is liable where it had 'actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action.'" *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); see also *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989) (noting that liability cannot be imputed to employer where it takes remedial action "'reasonably calculated to end the harassment'") (quoting *Katz)*, vacated and remanded on other grounds, 900 F.2d 27 (4th Cir. 1990) (en banc).

The court then held: "Drawing upon that settled law, we conclude that where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action." 55 F.3d at 156. See *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Circ. 1990) (employer not liable because proper remedial action was taken); *Ebert v. Lamar Truck Plaza*, 878 F.2d 338, 339 (10th Cir. 1989) (approving of a finding of no liability where prompt correction action is taken). See also *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) ("The employer's legal duty is thus discharged if it takes reasonable steps to discover and rectify acts of (discrimination) of its employees.").

Here, timely and adequate corrective measures were taken, especially considering that there was no harm caused by the age note. The Deputy Director counseled the employee who wrote the note, and had an entirely new panel review plaintiff's application.

Finally, defendant has proffered a legitimate, nondiscriminatory reason for finding that plaintiff was not qualified. She did not have the required three years of experience

after receiving her professional degree. She did not have a Masters of Divinity or its equivalent. She did not have a professional degree from an accredited institution. Each of these three is a required qualification for the chaplain position

First, the Court has already denied the plaintiff's motion to amend the complaint to add a *Bivens* claim, which is the only appropriate means to assert a constitutional violation against a federal employee (outside of a Fifth Amendment takings claim under the Tucker Act). In response to plaintiff's motion, defendant argued that there are "special factors counseling hesitation (against allowing this constitutional claim) in the absence of affirmative action by Congress," and that "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Defendant's Response to motion to Amend Complaint, at 1 (citing *Robbins v. Bentsen*, 41 F.3d 1195, 1200 (7th Cir. 1994) (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). The *Robbins* court went on to explain that the existence of a comprehensive remedial scheme for federal employees with employment complaints, counseled against a *Bivens* remedy. 41 F.3d at 1201.

Specifically, the Civil Service Reform Act (CSRA), 5 U.S.C. ¶2301 et seq., prohibits the violation of the constitutional rights of federal employment applicants. See *Robbins*, 42 F.3d at 1202 ("The Merit System Principles specifically require that '[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ...with proper regard for their privacy and constitutional rights.") (quoting 5 U.S.C. ¶2301(b)(2). The court held that this congressionally established remedial scheme precludes the creation of an alternative remedy under the Constitution. Id. At 1202. The CSRA is the remedial scheme by which Congress intended to protect an applicant's constitutional rights in the employment context. See id. (Citing cases, including *Lombardi*

v. Small Business Admin., 889 F.2d 959, 960-61 (10th Cir. 1989). See also *Hicks v. Brown*, 929 F. Supp. 1184, 1188 (E.D. Ark. 1996) ("In light of the comprehensive remedial structure of the CSRA, this Court finds that a *Bivens* action is unavailable to plaintiff for the alleged violation of her First Amendment Rights.") (citing the Tenth Circuit's *Lombardi* decision).

Thus, there is no constitutional remedy available for a constitutional violation in the federal employment context, and plaintiff's constitutional claim must be dismissed.

ii. Defendant's policies comply with the Constitution

The standards for assessing whether one is qualified for a chaplain position in a VA hospital are addressed in *Murphy v. Derwinski*, 990 F.2d 540, 545 (10th Cir. 1993). In a footnote the Murphy court set forth what the VA Manual's requirements for a chaplain position as they existed at the time of the *Murphy* decision. Those requirements were:

> (1) [the applicant] must be a citizen of the United States; (2) [the applicant] must be an ordained clergyperson; (3) [the applicant] must have a Bachelor of Arts or Science degree (or its equivalent) from an accredited college or university plus a Bachelor of Divinity Degree (or its equivalent) from an accredited theological institution. Approximately 210 semester hours or more are required for such degrees. In most cases, the current equivalent of the Bachelor of Divinity Degree is now termed a Master of Divinity, but requires the same amount of academic preparation. (4) [the applicant] must have at least 3 years of full-time clergy experience after ordination, in which the principal duty was as a clergyperson after completion of professional preparation; and (5) [the applicant] must have an ecclesiastical endorsement. *Murphy*, 990 F.2d at 545. The

Murphy court invalidated the ordination requirement on the grounds that it discriminated against women on the basis of sex. The court found that the ecclesiastical endorsement alone was enough to ensure that VA patients receive sufficient religious services. Ordination was not necessary.

It cannot be implied from the Tenth Circuit's decision in *Murphy*, however, that ecclesiastical endorsement alone is sufficient qualification for someone to be a VA chaplain. The sufficiency of an ecclesiastical endorsement goes to a VA chaplain's ability to perform religious services for VA hospital patients. The *Murphy* court pointed out, however, that a "VA hospital chaplain is 'not simply a preacher but a secular employee hired to perform duties for which he has, by dint of his religious calling and pastoral experience, a special aptitude.'" 990 F.2d at 545 (quoting *Baz v. Walters*, 782 F.2d 701, 705 (7th Cir. 1986). Performing religious services is only one of many duties of a VA hospital chaplain. Other duties of a VA hospital chaplain require pastoral training and experience,[2] and other education consistent

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2 There is a reported case in which the VA hired a full-time VA chaplain although the applicant lacked the three-year post-graduate experience. *Baz v. Walters*, 782 F.2d 701, 703 (7th Cir. 1986). However, that situation was not analogous to Ms. Franklin's because Ms. Franklin and Reverend Baz were not like-qualified applicants. Unlike Ms. Franklin, Reverend Baz held a Master of Divinity degree from an accredited institution and held a part-time position as an associate pastor and hospital chaplain for six years while continuing his studies. *Baz*, 782 F.2d at 703. Fur-thermore, one of the arguments advanced by the VA and upheld by the Seventh Circuit for Reverend Baz's subse-quent removal from his chaplain position was that he should never have been appointed to the chaplaincy because he lacked the three-year post graduate experience requirement. Id. at 704.

with the provision of counseling and other medical care services. The standards set forth above, excluding ordination, are necessary prerequisites for providing the type of chaplain services the VA has determined are necessary to meet the needs of veterans. It cannot be that a federal agency must consider as "qualified" any person who can secure an endorsement from an ecclesiastical body. Such a holding would throw the personnel regulations out the window.

The Tenth Circuit has addressed an employer's right to set personnel qualifications when hiring job applicants, under Title VII. *York v. American Tel. & Tel. Co., 95 F. 3d 948, 954 (10th* Cir. 1996). The court held: "It is not the fact finder's task to assess which of an employer's stipulated qualifications ought to be required of applicants for a particular position. 'Employers are given wide discretion in setting job standards and requirements and in deciding whether applicants meet those standards.'" *York*, 95 F.3d at 954 (citation omitted).

IV. CONCLUSION

For the reasons stated above, the Court should grant judgment in defendant's favor and against plaintiff.

Respectfully submitted this 31st day of January, 1997.

HENRY L. SOLANO
UNITED STATES ATTORNEY

/s/
By: Michael E. Hegarty
MICHAEL E. HEGARTY
Assistant United States Attorney
1961 Stout Street, Suite 1100
Denver, Colorado 80294
(303) 844-3888

APPENDIX E—EXHIBIT 1

Extracts from Application for Federal Employment—SF 171—attached to Defendant's Brief in Support of Motion for Summary Judgment as Exhibit 1

FRANKLIN, BARBARA 227-44-3586

Work Experience for Chaplain (GS-060-12)

I was in the 1712 Series up until January 20, 1993. Because of the base closure schedule for the near future, my position has changed. Please review my SF171 for other positions held during my 23 years tenure with the Department of Defense; Health; Education and Welfare; and the Veterans Hospital.

I worked for two years in a pilot program in the City of Seattle which was sponsored by the Kennedy Administration. I was hired as a Licensed Practical Nurse (LPN) and worked in the Detoxification Nursing Department within the Methadone Program. My duties included interaction with counselors, doctors and administrators in the Methadone treatment of patients.

I am an Ordained Minister in the African Methodist Episcopal System, and am not a Pastor, but an Associate. As an Associate, I perform duties such as conducting worship services in the absence of the Pastor. I conduct seasonal and occasional services as directed or requested. I prepare and deliver sermons. I perform weddings and counsel couples. I perform funerals and follow up on the family's physical and mental status after a death. I give religious instruction, individually and in groups. I work with the feeding program at our church and also on Lowry Air

Force Base. I instruct weekly Bible Study Groups at the Federal Correctional Institution in Englewood, Colorado as a Volunteer on a weekly basis, as my church releases me for this service. I participate in Inmate Seminars on Lowry AFB and join the Chuck Colson Ministry Groups for Community Mentoring Programs. I have been involved in Weekend Seminars at F.C.I. I independently coordinated and carried out the Black History Week Program in February, 1993,

I am qualified to provide religious instructions on an individual basis, as well as to congregations, patients and inmates. I have worked with Youth for Christ, U.S.A. Currently, I lead Chapel Services for the employees who work in the Headquarters at Lowry AFB here in Denver.

Some of my methods of instructing classes, forums, discussions and tutoring involve using over-head projectors and films, distribution of religious literature and education programs. All of these programs serve to help enhance lives, give moral support and offer a therapeutic value.

I help my Pastor in Pastoral Care by being involved with personal visits and give encouragement to the sick and shut-ins in hospitals and prisons. I participate in the Family Counseling special program and visit as referred and requested.

I assist in the administration of the sacraments, and sometimes interview to ascertain religious background and needs of the individuals who attend our church. I serve as a Spiritual Counselor to the church's family on ethical and moral matters. Issues have included single parent homes, and the drug, alcohol and gang activities which invade our homes and community. I try to serve as a positive catalyst in such conditions in the homes and on a community-wide basis. Stress sometimes paralyzes our area where we live and work, and often the community look toward the ministers for consolation and the strength to go.

I am a member of the Methodist Ministries Alliance, which deals with the community's problems. I am also one of the church's major fund raisers for the ongoing upkeep of our church.

My work for F.C.I. is under the direction of Chaplain Vangilden and he assigns me to assist in varying degrees. I am now forming a Mentoring Group under Chuck Colson's Ministry in our church to connect with F.C.I. Inmates.

My education is included in my SF171. I have a B.A. in Sociology, an M.A. in Human Relations and a Ph.D. in Therapy Counseling. I also have numerous additional studies in related areas.

My philosophy is that I can make a difference, and as an ordained minister, it is my spiritual obligation to offer support to the veteran community.

I hold a Ph.D. in Theocentric Counseling, a Master's degree in Human Services and a Bachelor's degree in Social Welfare. I have taught adult education for the U.S. Army, Air Force and Marines for a combination of well over twenty years. The subjects include Counseling, Orientation, Human Relations and the many facets of introduction into the military life, sexual harassment, inclusion and exclusion by gender, race, religion, etc. I taught a course in ethics as it related to sexual conduct in reference to the USAF Uniform Code. I also wrote the Advanced Counseling Courses for the Air Force's Community College, which were implemented worldwide.

I am a Licensed Practical Nurse and have a great interest in combining my work experience.

/s/ Barbara Franklin

APPENDIX E—EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-S-1031

BARBARA G. FRANKLIN,

Plaintiff,

v.

JESSE BROWN, Secretary, Department of Veterans Affairs,

Defendant.

AFFIDAVIT OF ALTON KEITH ETHRIDGE

Comes your affiant Alton Keith Ethridge, after being sworn, and under oath state the following:

1. I am currently the Commandant of the VA Chaplain School, National Veterans Affairs Chaplain Center, Hampton, Virginia. During the time period of Ms. Franklin's application, I was the Region 4 Chaplain Manager/CPE. I have been employed by the VA since January 1988. I am a white male 43 years old.

[¶¶'s 2-8 omitted]

9. In light of the under representation of minorities and women in the VA chaplaincy, I viewed Ms. Franklin as a very desirable candidate for a chaplain postion.

[¶ 10 omitted]

/s/ Alton Keith Ethridge
ALTON KEITH ETHRIDGE

The foregoing instrument was acknowledged before me this 22nd day of January, 1997 by Alton Keith Ethridge.

/s/ unintelligible Notary Public

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-1031

BARBARA G. FRANKLIN,

Plaintiff,

v.

JESSE BROWN, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

U.S.District Court Denver, Co '97 Jan 30 P3:44 James R. Manspeaker Clerk

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PLAINTIFF'S VERIFIED MOTION FOR SUMMARY JUDGMENT

Plaintiff, Rev. Barbara G. Franklin, hereafter "Rev. Franklin", through her attorney, Daniel F. Lynch, hereby submits her Motion for Summary Judgment upon grounds stated, as follows:

MATTER AS TO WHICH SUMMARY JUDGMENT IS SOUGHT

1. Rev. Franklin asks this Court to rule, as a matter of law, that the defendant, hereafter "the VA", is prohibited by the religious test clause of Article VI and by the Establishment Clause of the First Amendment of the Constitution of the

United States from establishing theological or religious educational requirements for VA chaplains, and that, by doing so in this case, the VA impermissibly refused to consider Rev. Franklin's application for employment as a VA Chaplain.

STANDARDS FOR REVIEWING MOTIONS FOR SUMMARY JUDGMENT

2. Summary judgment is appropriate only if there are no genuinely disputed issues of material fact and, viewing the record in the light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996)

UNDISPUTED FACTS

3. The following facts are undisputed by either party in the litigation:

3.1 Rev. Franklin applied to the VA for a position in the Veterans Medical Center at Denver, Colorado;

3.2 Rev. Franklin is a member of three protected classes, to-wit: She is an African-American, Female, and was 62 years of age at times pertinent hereto.

3.3 On August 8, 1994, pursuant to the VA's advertisement of the position, Rev. Franklin applied for a position of Staff Chaplain, GS-060-11, at the Veterans Medical Center in Denver, Colorado.

3.4 In September, 1992, Rev. Franklin was ordained as a minister in the African Methodist Episcopal System and was certified as a "Fully Qualified Member of the Clergy of Chaplaincy of Full Gospel Churches", a religious

denomination recognized by the VA as a proper sponsor of chaplains.

3.5 The VA refused to process Rev. Franklin's application, finding that she failed to meet the minimal requirements in experience and education, and, specifically, that she did not have:

3.5.1 the bachelor of arts and bachelor of divinity or sacred theology degrees, as evidenced by a transcript of credits from an accredited college, university, or theological institution;

3.5.2 the equivalent of the education required, because her graduate school transcripts did not evidence significant coursework in divinity, biblical studies, church history, biblical languages, or theology;

3.5.3 at least 3 years' experience in which the principal duty was a clergyman after completion of professional preparation and which demonstrated a background of practical pastoral knowledge and skill, or its equivalent.

3.6 For several months, Rev. Franklin served as a volunteer at the Veterans Medical Center in Denver, providing many of the same services rendered by full time chaplains, and that the VA paid Rev. Franklin for performance of certain services.

3.7 Female chaplains in the VA are few in number and the male to female ratio among chaplains is grossly disproportionate to the male-female ratio in the society at large or among veterans, in particular.

3.8 The person selected for the job opening of VA chaplain at the Veterans Medical Center in Denver, Colorado was a white male.

4. Rev. Franklin claims that her endorsement by her denomination for the position of VA chaplain is the only lawful qualification which may be imposed by the VA. She alleges that any tests imposed by the government, other than denominational endorsement, violate two clauses of the Constitution of the United States, *viz.* the Religious Test Clause of Article VI and the Establishment Clause of the First Amendment. She will argue this contention more fully below, but states her position here to establish that, if her contention as to this matter is accepted by the Court, she has established every requirement enumerated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1981), to wit:

4.1 She is a member of a protected class;

4.2 She applied for and possessed the qualifications for a job for which the VA was seeking applicants;

4.3 She was rejected; and

4.4 There was a continuing need for qualified chaplains, eventually filled by a person not a member of the protective class.

5. It cannot be contended by the VA that Rev. Franklin was rejected because a better qualified applicant applied. The record is clear that Rev. Franklin's application was never considered. Her qualifications were not weighed and found wanting in comparison with those of others. As in *Murphy v. Derwinski*, 776 F.Supp. 1466 [D.Colo.], aff. 990

F.2d 540 (10th Cir. 1992), her qualifications were never weighed because the Agency concluded that "you do not meet the VA qualification requirements for chaplain."[1]

6. The VA claims it found Rev. Franklin unqualified for two reasons: [1] she lacked the minimum education requisites, *i.e.* a "Bachelor of Divinity" degree, which the Agency claims, has been superseded by the "Master of Divinity" degree. And [2] she lacks the requisite experience, *i.e.* "Three years of pastoral care experience **after completion of professional preparation** . . ."[2]

7. As to matters which are not in dispute, Rev. Franklin submits the following propositions of law:

7.1 THE QUALIFICATIONS FOR EMPLOYMENT IMPOSED BY THE AGENCY CONSTITUTE A "RELIGIOUS TEST . . . TO . . . [AN] OFFICE . . . UNDER THE UNITED STATES" IN VIOLATION OF ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES; and

7.2 THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PROHIBITS THE AGENCY FROM CREATING OR ENFORCING REQUIREMENTS WHICH CONCERN THE APPLICANT'S RELIGIOUS CREDENTIALS.

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1 Exhibit A, letter of July 20, 1994 from John J. Batten, Personnel Management Specialist to Barbara G. Franklin.

2 Id. [Emphasis in original]

8. It cannot be disputed that the requirements that a chaplain must possess a Master of *Divinity* degree and three years *pastoral* experience are religious tests imposed as a condition of public employment. On its face, therefore, Article VI of the Constitution of the United States applies:

> " . . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Torasco v. Watkins*, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961)

9. In any number of cases, of which only a few are cited below, the U.S. Supreme Court has made it clear that the First Amendment is designed, among other things, to prevent government from an "excessive entanglement with religion." *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 25 L.Ed. 697, 90 S.Ct. 1409 (1970); *Lemon v. Kurtzman*, 403 U.2. 601, 29 L.Ed. 745, 91 S.Ct. 2105 (1971); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L.Ed.2d 948, 93 S.Ct. 2955 (1973); *Aguilar v. Fenton*, 473 U.S. 402, 87 L.Ed.2d 290, 105 S.Ct. 3232 (1985).

10. *Murphy v. Derwinski, supra.*, holds that the VA may not impose ordination, an ecclesiastical status, as a requirement for service as a chaplain, and that a sufficient test of qualification is endorsement by a church or denomination.

11. Excessive entanglement inevitably accompanies the Agency's attempt to define the qualifications of ministers of religion. That is made manifest by the Prehearing Statement

submitted by the VA to the EEOC[3]. Consider the following arguments taken from that statement:

> "The Complainant's argument . . . that the *Murphy* holding mandates that the VA must blindly rely on any church endorsement (whether the church happens to be a nationally renowned institution or some fly-by-night organization) stretches the Tenth Circuit holding to a point that was never intended . . ." [4]

> "The Complainant's application was reviewed on two separate occasions, and by two separate reviewing groups. Both times the reviewers determined that the Complainant failed to meet two necessary components of the job criteria, namely: 1) education; and 2) experience."[5]

12. It is fair to ask:

What is the source of the Agency's power to determine the proper credentials for ministers of religion?

By what authority does it decide which churches are "nationally renowned", and therefore respectable, and which are "fly-by-night" organizations?

These are precisely the sorts of judgment which are prohibited by the First Amendment.

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[3] Exhibit B, p. 11.

[4] *Id.*, p. 13.

[5] *Id.*, p. 12.

13. When public officials deny the credentials of a dentist or engineer, it may be appropriate to note that separate reviewers reached the same conclusion. Dentists and engineers perform secular services, and the standards defining acceptable qualifications are within their competence. People who perform sacerdotal, spiritual or other religious functions, however, operate in a dimension beyond the competence of governmental reviewers. If government is incompetent to write and mandate the saying of a simple prayer,[6] it is surely incompetent to determine qualifications for those who perform the full range of religious services. When multiple groups review sacral matters, they merely compound the entanglement which is forbidden by the Constitution. Consider, the letter by which Rev. Franklin was advised that she was not qualified:

> "Because your graduate school transcripts do not show significant coursework in *divinity, biblical studies, church history, biblical languages or theology*, your coursework is not equivalent to the M.Div."[7] [Emphasis added.]

Is this the criteria of a "Personnel Management Specialist"? If so, what is left to Pope, Bishop, Council, Synod or Presbytry? The fact that the judgment of this person was reviewed by those who possess acceptable "M.Div's" does not solve the problem. It compounds it. Clergymen employed by the government have no more business making binding decisions on the qualifications of those seeking employment as chaplains than

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Engle v. Vitale, 370 U.S. 421, 8 L.Ed.2d 601, 82 S.Ct. 1261, 86 ALR2d 1285 (1962). "It is neither sacrilegious nor anti-religious to say that . . . government . . . should stay out of the business of sanctioning or writing official prayers and leave that purely religious function to the people themselves and those to whom the people choose to look for religious guidance." at p. 435.

7 Exhibit A.

secular bureaucrats. To permit them to do so is the first step in establishing a religion, a religion of "nationally renowned" institutions whose members agree on coursework and experience necessary to serve the Lord, and which excludes "fly-by-night" organizations. When already employed chaplains determine that an "M.Div." is a better credential for public chaplaincy than a "Doctorate in Theocentric Counselling", the government is in the business of mandating qualifications for the clergy, a religious function perhaps more essential to establishment than any other. Kings have fought with Popes over the right to name the clergy. When the government arrogates the power unto itself to name the clergy serving its clients, it has determined which religion or religions are acceptable and which are not. That is precisely what government may not do.

14. From early days, questions have been raised about the use of paid chaplains.

> "The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship . . . to be performed by Ministers of religion, . . . and these are to be paid out of the national taxes. Does this not involve the principle of a national establishment, applicable to the provision for a religious worship . . . approved by the majority, and conducted by Ministers of religion paid by the entire nation?"[8]

15. Although the quote above related to Congressional Chaplains, Madison included in his strictures

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[8] *The Writings of James Madison* (New York, 1900-1910) 9 vols. IX. p. 558.

against establishment the practice of paying military and naval chaplains as well.[9] Not long ago, the Supreme Court upheld the practice of employing legislative chaplains. *Marsh v. Chambers*, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S.Ct. 3330 (1983). Conceding that paying clergymen for performing a religious function appears, on its face, to violate the Establishment Clause, the Court based its opinion on the antiquity and continuity of the practice. It noted that the same First Congress which referred the First Amendment to the States for ratification, employed legislative chaplains as well as military chaplains. These latter ministers are predecessors to the chaplains who serve the Veterans Administration. Rev. Franklin does not dispute the constitutionality of such employment. People who are kept in state facilities bring their needs, including their spiritual needs, with them. Having physical custody of persons, requires that the state act to see that all its clients' needs are met.

16. On the other hand, the state may not declare or enforce any orthodoxy or orthopraxy. When the state sits in judgment on the number and kinds of courses in "divinity, biblical studies, church history, biblical languages or theology", as the VA has done in this case, it breaches the wall of separation which, however serpentine it has become, still stands between church and state. One need only contemplate the fact that both native American shamanism and Celtic Wica are resurgent. When there are a sufficient number of adherents of these religions in the armed forces and in Veterans Medical Centers, they will be entitled to the service of shamans, witches and warlocks as chaplains. Will the Agency then set minimum standards for casting and removing spells, divination of omens, propitiation of spirits and spiritual healing? Will it impose minimum education and experience standards to assure that occult practitioners are proficient? Will it designate accrediting agencies to pass on the quality of their training or

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[9] *Id.* 558-560.

apprenticeship? To ask such questions is to hear the plain and obvious answer: these are matters outside the realm of secular power. "Congress shall make *no law* respecting the establishment of religion" and "*no religious test* shall ever be required as a Qualification to any Office or Public Trust under the United States." [Emphasis added]

17. Having met the *prima facie* test required, the VA having failed to meet its burden to articulate in its answer any nondiscriminatory reason for its refusal to hire her, Rev. Franklin believes she is entitled to a summary judgment finding unlawful discrimination based upon her sex, female, and that she is entitled to the relief sought in her complaint.

Dated: January 30, 1997.

Respectfully submitted

/s/ Daniel F. Lynch
Daniel F. Lynch
Attorney for Plaintiff
1900 Grant Street, Suite 600
Denver, Colorado 80203
(303) 830-7274, FAX (303) 830-0255

State of Colorado]
] ss.
City and County of Denver]

I, Barbara G. Franklin, do solemnly affirm that I have read the foregoing Plaintiff's Verified Motion for Summary Judgment, and that the statements of fact set forth therein

are true of my own personal knowledge and/or to the best of my knowledge and belief.

/s/ Barbara G. Franklin
Barbara G. Franklin, Affiant

Sworn and subscribed before me on January 29, 1997 by Barbara G. Franklin, a person known to me. Witness my hand and official seal.

My commission expires: 4-2-01

/s/ John Cimino
Notary Public

APPENDIX G

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

Article VI of the Constitution of the United States concerning religious tests

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution, but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

APPENDIX I

42 U.S.C. § 2000e-2a

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer

(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. .